INTERPRETATION
OF
DOCUMENTS

" It is the fate of all courts of justice upon wills, it is the peculiar destiny of this court in contracts, wills, and trusts, to be the authorised interpreters of nonsense, and to find the meaning of persons that had no meaning at all,

Ex fumo dare lucem,
ut speciosa dehinc miracula promat.

" A creative power is required to bring light out of darkness, and sound or specious determinations from unintelligible instruments. Civil polity, however, requires that there must be some supreme seer who is finally to arbitrate all disputes with certain justice and unquestionable satisfaction. Thank God, it is not this Court!

" The rise of all these difficult questions seems to have been from the law, like all other sciences, using technical expressions not understood by the vulgar, and frequently as little by those they employ; and as the genius of this country abhors, and ought to abhor, all arbitrary determinations upon right and property, the ablest and greatest judges successively seem to have laboured to bring these cases, primarily anomalous, to some rule, or analogy of rule; and indeed the exceptions have not been properly such (that is, not simple exceptions), but rather an arrangement of cases excepted under another and stronger legal rule, *the intent of the testator.*"

Per Lord HENLEY, L.C., in *Le Rousseau* v. *Rede* (1761), 2 Eden 1, at pp. 4, 5.

INTERPRETATION OF DOCUMENTS

BY

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RECORDER OF CAMBRIDGE

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PREFACE TO SECOND EDITION

THE first edition was exhausted within a few weeks of publication and a reprint has also been exhausted. This encourages me to believe that this book has served its purpose.

In this edition I have endeavoured to give effect to criticisms that made suggestions for improvement. I have made no substantial changes but have rearranged and somewhat expanded certain parts and brought the whole up to date.

ROLAND BURROWS.

TEMPLE,

21 *May*, 1946.

PREFACE TO FIRST EDITION

THE purpose of this book is to present in a small compass the leading general principles that govern the interpretation of documents. It is hoped that it will prove an advantage to students and also to practitioners who at times find that points as to construction sometimes unexpectedly arise when their libraries are not easily available.

It has been assumed that the problem is to ascertain what the writer meant by the words he has used to convey his intention. His general intention may or may not be clear, but in any controversy as to his meaning, the solution is always the judge's understanding of those words. For that purpose the judge is entitled to have regard to certain external considerations and is not entitled to use others, and he may be entitled to use them for some purposes and not for others. Again, in reading and construing the words themselves, there are considerations that he must or may bear in mind but he has not entire liberty of action. What are here discussed therefore are those principles which have been laid down for the guidance of the Courts in matters of construction. The subject, however, is only dealt with in general outline. Besides the general rules of construction, there are, in particular subjects, subsidiary or special rules which are the proper subject of the text books dealing with those subjects. This book is not intended to deal with such particular rules.

The decisions that may be cited are very numerous. The general principle upon which selection has been made is to cite decisions from different periods where a rule has a long history, but as the book is intended for present use citation has been made more frequently from recent decisions than from the older ones.

The writer has to thank Mr. W. Cleveland-Stevens, K.C., for help and kindly criticism, and regrets that the untimely death of Mr. Justice Langton limits acknowledgment to recalling his encouragement and interest in the writing of this book.

ROLAND BURROWS.

TEMPLE,

5 *April*, 1943.

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INTERPRETATION OF DOCUMENTS

CHAPTER I

PRELIMINARY

Nature of a Document

A DOCUMENT is some substance, usually paper or parchment, inscribed with words or symbols for the purpose of affording information. These symbols must be such that every reader who understands them will render them into speech in the same words.[1]

There are three matters in connection with the use of a document in evidence that must be clearly distinguished.

First, the establishment of the document as being that which it purports to be, including requirements as to form, execution, registration, probate, secondary evidence of its contents, and the like. Unless the document is admitted, in the cases where such admission is permitted by law, this is a matter requiring evidence, and evidence to support or attack the authenticity of a document is freely admissible.

Second, once such a document has been admitted in evidence, the Court must determine what is the meaning of the document and its application to the circumstances to which it is intended to apply. Here primarily there is no need for evidence except such as is essential to enable the Court to read and understand and then apply the document.

Third, the effect in law of the document has to be determined, whether it does or does not conform to the rules of law applicable to it. This is a pure matter of law, which requires no evidence.

The following pages deal only with the matter of interpretation; it is assumed that the document under consideration has been admitted or established. The rules governing the interpretation of documents differ from those which deal with the proof of documents and also from those which govern the admission of evidence for the purpose of attacking, or qualifying the legal effect of, documents, *e.g.* where the issue is whether the document is forged or has been materially altered or was obtained by fraud or executed by mistake or is subject to some collateral condition or has been varied or rescinded or ought to be rectified or the like. Again, the effect of a rule of law in defeating the intention of the parties

[1] See *Hill* v. *R.*, [1945] K. B. 329, *per* HUMPHREYS, J., at pp. 332–4.

is also not included. The question whether the intention is consistent with the law can only arise when it is settled what that intention is.[1]

Interpretation therefore lies midway between ascertainment of the authentic words and application of the rules of law to those words when ascertained and interpreted. It is not concerned with either of the other stages, though in certain cases the meaning of words can be ascertained or confirmed with more certainty by considering how the words in question came to form part of the document,[2] and on occasion the consequences that follow on the adoption of one or other of the possible meanings may turn the scale, on the principle *res magis valeat quam pereat*. Sometimes interpretation may assist in establishing or destroying authenticity, *e.g.* where the document betrays a knowledge of events which had not happened or of law which had not been established at the date when it purports to have come into existence. The lines of demarcation between these three operations are clear and distinct.

Object of Interpretation

The object of interpretation is to ascertain and declare the intention of the party or parties from the words used in the document or documents under consideration. "The very office of construction is to work out, from what has been expressly said or done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered."[3] Subject to exceptions, which are dealt with later, it is not the function of the Court to ascertain that intention otherwise than from those words in the context in which they appear. This principle has been stated on many occasions. "I must say that I for one have always protested against endeavouring to construe an instrument, contrary to the words of the instrument itself, by some preconceived idea of what the parties would or might or perhaps ought to have intended when they began to prepare their instrument."[4] As to statutes,

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[1] See *per* BULLER, J., in *Hodgson* v. *Ambrose* (1780), 1 Doug. (K. B.) 337, at p. 342; affirmed *sub nom. Ambrose* v. *Hodgson* (1781), 3 Bro. Parl. Cas. 416; and see *Konski* v. *Peet*, [1915] 1 Ch. 530, at p. 538. It must be remembered that the law cannot be evaded by calling things that which they are not. "The parties may write the agreement in such terms as they please, and, if so minded, may attach any label they wish to the payments agreed to be made. But when all that is done, it is for the law to decide on the effect of the document. . . . No label can create a fact: a label may accurately describe a fact, or it may misdescribe it or may help to the solution of a doubtful question of interpretation. What the parties have done—not their description of it—is the determining consideration" (*Samuel* v. *Salmon & Gluckstein, Ltd.* [1946] Ch. 8, *per* UTHWATT, J., at p. 13).

[2] See *Rickards* v. *Forestal Land Co.*, [1942] A. C. 50, at pp. 72, 92, 100.

[3] Holmes: The Common Law (1945 printing), at p. 303.

[4] *Smith* v. *Cooke*, [1891] A. C. 297, *per* LORD HALSBURY, C., at p. 299.

" The duty of the House is to interpret the section as it stands, and I must respectfully refuse to adopt an interpretation which seems to me not to follow the language which the Legislature has chosen to employ." [1] The document alone is considered for this purpose construed in the light of the relevant surrounding circumstances.[2] " What a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention." [3] " It is, I conceive, a fundamental principle of our law, that, where you have a contract which has a plain natural meaning, and which is not impeached upon the ground of common mistake or upon the ground of fraud or misrepresentation, it is not permissible to alter its effect according to the intention of one of the two contracting parties or to adduce evidence in order to show such an intention. If A and B enter into a contract, it is immaterial to consider what either of them intended to effect. The only question is, what have they said by their contract." [4]

When Rules of Interpretation not needed

Whenever the document is couched in language which is clear and definite and no doubt arises in its application to the facts, there is no need to resort to rules of interpretation. Their function is to ascertain, if possible, the exact meaning of a document which is not clear and definite. This consideration must be borne in mind because it explains why rules of construction are not always used and evidence is often inadmissible. The task is to make plain what is obscure, and a rule that is useless for that purpose or evidence which tends to raise and not assist in solving doubts will not be permitted to waste the time or hinder the task of the Court. A great deal of evidence that is admissible to resist or support an attack upon a document will not be allowed when the document, having been established, is being interpreted.

Causes of Obscurity

Language is at best an imperfect vehicle for expressing thought and intention.[5] It is not always sufficiently realised that a word by

[1] *Representative Body of the Church in Wales* v. *Tithe Redemption Commissioners*, [1944] A. C. 228, *per* Lord SIMON, C., at p. 242.

[2] See *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at pp. 526, 556; *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651, at p. 663; *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, at p. 106; *Skelton* v. *Younghouse*, [1942] A. C. 571, at p. 577; and see *post*, p. 20.

[3] *Simpson* v. *Foxon*, [1907] P. 54, at p. 57.

[4] *Reliance Marine Ins. Co.* v. *Duder*, [1913] 1 K. B. 265, *per* KENNEDY, L.J., at p. 273.

[5] " The poverty of our language compels us frequently to use expressions which do not with precise accuracy define what we mean. Hence the use of many elliptical phrases " (*Heard* v. *Holman* (1865), 19 C. B. (N. S.) 1, *per* BYLES, J., at p. 11).

itself may have several, and indeed many, different meanings, and that it may be, and usually is, modified in any of its meanings by its association with other words. It is not often that the meaning of a single word matters except as building up or affecting the meaning to be attributed to a phrase or sentence or clause. The emphasis placed on a word in a clear and unambiguous sentence may change the effect of the whole sentence.[1] A shorthand note does not give either the emphasis or the pauses, except so far as punctuation fulfils that function, and yet such matters may be vital to the true understanding of the words used. However, as the rules of interpretation apply to written documents, and not as a rule to the records of oral statements, this latter difficulty does not often arise. It is therefore unnecessary to discuss the devices, such as changes of type, italics, underlining, etc., that are used for the purpose of indicating emphasis and the importance of particular words and phrases.

Expression or understanding may also suffer from the fact that writer or reader may not have an adequate command of the language. What appears to the writer to be clear and unmistakable may appear to the reader to be obscure. The writer, when expressing his thoughts, may not have got them clear or expressed them all, and in any case is apt to overlook the fact that others may not possess his knowledge; he therefore tends to omit as obvious matters that are of importance, and even vital, to the understanding of his words.[2] There is also the chance that he may not have appreciated all the contingencies that may occur,[3] and his statement may therefore have to be applied to circumstances which he never contemplated and for which his words are not apt.[4] He

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[1] Thus, it was pointed out in *R.* v. *Haddy*, [1944] K. B. 442, that the adverb "inevitably" was used in a former judgment merely as an adverb of emphasis.

[2] "The question is hopelessly vague and I am quite unable to give any precise meaning to it . . . the proposer is required to warrant the truth of his answer. Questions of this kind are . . . mere traps," *per* GREENE, M.R., in *Zurich General Accident etc. Co.* v. *Morrison*, [1942] 2 K. B. 53, at pp. 57, 58.

[3] *Re Sharman's Settlement, Public Trustee* v. *Sharman*, [1943] Ch. at pp. 7, 8 (where a statute altered the law after the settlement was made), and see *Field* v. *Gover*, [1944] K. B. 200, at p. 213.

[4] "The problem in this case is the not unfamiliar one of deciding how an agreement should be construed when its written terms . . . do not include any express provision to meet a contingency which the parties presumably never anticipated but which has since occurred. The rule to be followed in such cases is clear. The only difficulty is in applying it. The rule is that we are not to make a new agreement for the parties, or to speculate how they would have dealt with the new contingency had they anticipated it; but that (except in cases where the intervening event produces frustration) we have to take the words of the agreement as they stand and apply them, as best we can, to the new situation which has caused the difficulty" (*L.C., Ltd.* v. *G. B. Ollivant, Ltd.*, [1944] 1 All E. R. 510, *per* Lord SIMON, L.C., at p. 511).

may over-simplify or over-elaborate, and thus become obscure or even unintelligible.[1] He may have an imperfect knowledge of the language or of the rules of grammar. He may in dealing with technical matters use technical words which are only fully understood by persons of competent skill in such matters, of whom he may or may not be one. He may use them in relation to non-technical matters, whereby doubt and difficulty are certain to arise.[2] He may use or misuse forms.[3] In fact, the expression of the writer's intention may be imperfect in an almost infinite variety of ways.[4] Similar considerations apply to the reader. but where the reader is a

[1] " The sentence is difficult to construe, because of its succinct condensation," *per* MACKINNON, L.J., in *Salisbury* v. *Gilmore*, [1942] 2 K. B. 38, at p. 49.

[2] " The fact that these laymen do not know the technical words and have used the very inapt phrase ' the Schedule of Completion ' does not, I think, justify the Court in ignoring what seems to me the guiding phrase which indicates the sort of document which the parties were thinking about " (*Clifton* v. *Palumbo*, [1944] 2 All E. R. 497, *per* Lord GREENE, M.R., at p. 500).

[3] It may not be his fault. A Lloyd's policy, *e.g.*, has a long history and requires understanding. Commercial men are loth to change forms the effect of which they know in favour of new forms which may require extensive litigation to elucidate. Sometimes new forms carry over obsolete phrases. " A time charter is, in fact, a misleading document, because the real nature of what is undertaken by the shipowner is disguised by the use of language which is appropriate to a contract of a different character then in use. . . . Certain phrases which survive in the printed form now used are only pertinent to the older form," *per* MACKINNON, L.J., in *Sea & Land Securities* v. *Wm. Dickinson & Co.*, [1942] 2 K. B. 65, at p. 69.

[4] A direction in an Admiralty Notice to Mariners read " In circumstances where a single vessel has not taken early measures to keep out of the way . . . the Regulations for Preventing Collisions at Sea must be the guide." As to this LANGTON, J., said in *The Scottish Musician*, [1942] P. 128, at pp. 130, 131, " It may be entirely clear to mariners what that direction means, and, if so, it would be a great pity to say anything to disturb it in any way. I can only say that for my part it is not only far from clear but is almost beyond any interpretation at all, and my assessors, who are seamen, have just the same difficulties as I have in understanding the limits and ambit of it . . . I have great difficulty in understanding, first of all, what are ' early measures.' Where do they end ? Who is to be the judge of when ' early measures ' have not been taken ? . . . When the single vessel has not taken ' early measures,' the direction does not say that the Collision Regulations are to apply ; it says that they are to be the guide. Again, I am in difficulty as to what that means. I know what is meant by ' applying ' the Collision Regulations, but I do not understand a situation in which the regulations do not apply but are the guide, because I cannot visualise how they can be a guide if they do not apply." The learned judge then proceeded to state his understanding of the matter. It may be remarked that the latter part of his criticism is applied to a situation very similar to that which has existed for twelve years in regard to the Highway Code in relation to " running down " cases. See the Road Traffic Act, 1930, s. 45 (1), (4).

judge or lawyer, he should realise the limits of his experience and ought therefore to know when and in what manner he needs assistance. Words expressing intention are addressed to the understanding, and a decision as to their meaning is, therefore, a statement by the judge of his understanding of the meaning that they were intended to convey.

Rules of Interpretation Guides only

The rules of interpretation (or canons of construction) have been built up as a result of centuries of experience by judges and other authorities. They are aids in the task of ascertaining the meaning that lies behind most written statements, however imperfectly expressed. They are, as it were, the tools of expert craftsmen. They are apt to be edged tools, and, if misused, defeat their own object. Some are so important that they are in constant use and almost dominant. Others come into play when the more usual rules do not enable the judge to declare the meaning of the document. Some indeed are very rarely needed. They are all, however, guides and not dictators. If they assist, then they are used, but not otherwise. They are good servants but bad masters, as their employment as imperative rules tends to defeat the object, which in every case is to ascertain the meaning of the words as used in the particular document that is under consideration.

Intention the Dominant Consideration

The dominant consideration is what was meant by the words used. There would seem to be an apparent contradiction, for example, between the principle that words must be interpreted in the light of the intention expressed, and the other principle that the intention is to be ascertained from the words used in the document. This is not really the case. There is rarely a difficulty in ascertaining the general intention of the writer when the document has been read as a whole. A document which commences " This is the last Will and Testament " clearly manifests an intention to make dispositions to take effect on and after the death of the testator [1]; and a document headed " C.I.F. Contract " is presumably intended to be such.[2] It is not often that doubt can exist as to whether the parties intend to transfer property and not to let it, or to let and not to transfer it.[3] Again the expression " subject to contract " or its equivalent makes it clear that the intention is that neither party is to be bound until a contract is signed in the

[1] *Re Ragdale, Public Trustee* v. *Tuffill*, [1934] Ch. 352. The words do not necessarily show an intention to dispose of all the testator's property. The presumption against intestacy ought not to be allowed to do violence to the provisions of a will; see, *e.g.*, *Re Abbott*, [1944] 2 All E. R. 457, *per* Lord GREENE, M.R., at p. 459; and see *Reid* v. *Coggans*, [1944] A. C. 91, *per* Lord RUSSELL, at p. 98.

[2] *Re Denbigh* (1921), 90 L. J. (K. B.) 836, *per* SCRUTTON, L.J., at p. 840.

[3] *Pollock* v. *Stacy* (1847), 9 Q. B. 1033, at p. 1035.

usual way.[1] A statute which commences " Be it enacted " certainly is designed to alter or at least to declare some rule of law. These considerations will weigh heavily in dealing with the usual problem that arises, viz. the true meaning of some part of the document which, read literally, remains obscure.

Rules of interpretation have therefore been made in order to assist in elucidating the words used. If those words are clear then the rules are not needed, and it cannot be too often emphasised that they are employed in order to interpret obscure language, not to defeat the meaning of clear language. " Courts have no right to alter the language of a testator merely to effect what they conjecture him to have intended to say when that is at variance with what he has in fact said. But the words of a will, after all, are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the Court to execute the intention however inartificially expressed." [2] It may happen, however, that the writer has obviously set out with the intention of declaring one thing and has succeeded in saying quite plainly some other thing. If that is the case, then effect must be given to his words. It would not be the first time that a Balaam has set forth with his ass to make a solemn declaration and has found on the way that his intention has been defeated by the words of his ass.

In every case the Courts are placing a meaning on the words used, and, however benevolently inclined, are not entitled either to remake the instrument or to ignore the plain meaning of words [3] or to place upon doubtful words a meaning of which they are not capable.

Spirit of Interpretation

The same considerations apply as to the spirit in which statutes are interpreted. An Act of Parliament is construed in the same way as any other document.[4] When it is said that a statute is to

[1] *Spottiswoode, Ballantyne & Co., Ltd.* v. *Doreen Appliances, Ltd.*, [1942] 2 K. B. 32, at p. 35.

[2] *Askew* v. *Askew* (1888), 57 L. J. (Ch.) 629, *per* NORTH, J., at p. 633.

[3] *Hankey* v. *Clavering*, [1942] 2 K. B. 326, at p. 328 ; *Re Gourju's Will Trusts*, [1943] Ch. 24, at p. 30. " The Courts have not and certainly do not claim the right to say to Parliament or its draftsmen : ' Observe the rules which we lay down, or, though your meaning may be perfectly clear, we will teach you a lesson by interpreting your language in a sense which you obviously did not intend ' " (*No-Nail Cases Proprietary, Ltd.* v. *No-Nail Boxes, Ltd.*, [1944] K. B. 629, *per cur.* at p. 638 ; affirmed, [1946] 1 All E. R. 523).

[4] " The only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinising the language of the enactment in the light of the circumstances and the general policy and object of the measure," *per* Lord WRIGHT in *Liversidge* v. *Anderson*, [1942] A. C. 206, at p. 261. " So far as the Court in construing the Act is concerned at all with the policy, it is concerned with the policy embodied in it as gathered from its terms and with the means provided in the Act for giving effect to that policy " (*Tedman* v. *Whicker*, [1944] K. B. 112, *per cur.* at p. 117).

be strictly or liberally construed, that can only be the case where there is more than one admissible meaning. Where the meaning is clear, the question of strict or benevolent interpretation cannot arise. The Court must give effect to the expressed intention of Parliament.[1] But when that meaning is not so clear as to exclude any other meaning, there is scope for the Court to apply the wider or narrower[2] meaning according to what may properly be assumed to be the intention of Parliament, but not so as to render the enactment nugatory when another meaning which is possible will render it effective.[3] Thus in the case of a remedial statute, Parliament presumably intended to provide an effective remedy, and if, when taken literally, the words of the statute do not provide that remedy but are capable of a meaning which does provide it, then reason requires the Court to effectuate the intention by giving to the words their less obvious meaning. But it does not and cannot mean that the Court can provide a remedy which the statute does not give. The Married Women's Property Act, 1882,[4] was passed to enable married women to own and dispose of property in the same way as a feme sole. The statute clearly dealt with property held by them for their own benefit and consequently did not affect the position of a married woman trustee.[5] Subsequent legislation has dealt with her position. In the case of statutes which impose taxes or charges or penalties, the Court may properly assume that Parliament did not mean to go beyond what is within both the letter and the spirit of the statute. When the meaning is clear and it is probable that Parliament forgot or never had in mind the particular case which is before the Court, the Court will not speculate or attempt to remedy the defects of the legislation.[6] The omission

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[1] "It would not be right to cut down so comprehensive a phrase as 'progressive rent' merely because in certain circumstances it might lead to a result which would appear to be contrary to the policy of the Legislature" (*Bryanston Property Co., Ltd.* v. *Edwards*, [1944] K. B. 32, *per* Lord GREENE, M.R., at p. 37).

[2] As in *Vandyke* v. *Adams*, [1942] Ch. 155, 157, where the words "resident in enemy territory" were so construed as not to include a British officer who was a prisoner of war in Germany.

[3] *Nokes* v. *Doncaster Amalgamated Collieries*, [1940] A. C. 1014, at p. 1022. "We should approach the construction . . . without any general presumption as to its meaning except the universal presumption . . . that if there is any doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention . . . rather than one which will defeat that intention," *per* Lord MAUGHAM in *Liversidge* v. *Anderson*, [1942] A. C. 206, at p. 219; and see *per* GREENE, M.R., in *Worthing Corporation* v. *Southern Rail. Co.*, [1942] Ch. 437, at p. 442.

[4] 9 Halsbury's Statutes 374.

[5] *Re Harkness & Allsopp's Contract*, [1896] 2 Ch. 358.

[6] "It is clearly beyond the province of the Courts either to correct hardship or afford justice by an implication which is not based on the language of the Statute" (*Canadian Eagle Oil Co., Ltd.* v. *R.*, [1946]

may well have been deliberate. " The Court expounds the laws but does not make them." [1] It is for the reason that the Court cannot supply the omissions or correct the faulty dispositions of Parliament that the old principle of equitable interpretation of statutes has been discontinued. An omitted case is no longer included, although not mentioned, because it is within " the equity of the statute," as the deceased wife's niece was included in the prohibited degrees, though not mentioned. When Parliament has said what it meant to say, then presumably also it did not mean to say what it has not said. Still less is the Court entitled to say that Parliament did not enact what is plainly set forth in the statute.[2]

State Policy

State policy is not a consideration to which the Courts will pay attention when interpreting any document. The constitution has declared the respective functions of the executive and the judiciary.

A. C. 119, *per* Lord THANKERTON, at p. 142. " I have always thought it rather a misfortune that a Court has to construe an Act of Parliament, or what is equivalent to an Act of Parliament, according to the precise language used in the enactment in question and is not allowed to deal more generally with the result of the Act, having regard to the whole policy of the Act, and to correct what it may well think was an accidental oversight in the precise language used which would bring about a result inconsistent with that general policy ; but unfortunately one cannot adopt that line of reasoning. One has to construe the words which the legislation or the enactment equivalent to legislation has used " (*Green* v. *Woodhouse (Samuel) & Sons*, [1945] 1 All E. R. 683, *per* MACKINNON, L.J., at p. 687).

[1] *R.* v. *Rutter* (1711), Sess. Cas. (K. B.) 6. " The case therefore is one which comes quite clearly within the mischief at which the Act " [the Courts (Emergency Powers) Act, 1939] " was aimed. Nevertheless the legislature has not used language, whatever its intention may have been, wide enough to extend the relief of the Act to such a case. It may well be that the legislature will take into its consideration this and the other cases. . . . But at present we are not here to legislate but to interpret and administer the Act as we find it, and, however much we may think that this is a case which ought to have been given the protection of the Act, we cannot extend that protection to it unless the language justifies it," *per* GREENE, M.R., in *Re Leicester, etc., Building Society's Application*, [1942] Ch. 340, at p. 344 ; cf. *Wallrock* v. *Equity & Law Life Assurance Society*, [1942] 2 K. B. 83, at p. 85 ; and *Re Woolwich Equitable Building Society's Application*, [1942] Ch. 253, at p. 255. " We must not give the statutory words a wider meaning merely because on a narrower construction the words might leave a loophole for frauds on the Revenue. If on the proper construction of the section that is the result, it is not for judges to attempt to cure it. That is the business of Parliament," *per* Lord SIMON, C., in *Barnard* v. *Gorman*, [1941] A. C. 378, at p. 384.

[2] " The fact that the legislature may have enacted something which goes beyond what one would suppose to have been its original intention does not . . . justify . . . putting a limitation on the words of the Act for which I can find no justification on the words as they stand," *per* Lord CLAUSON in *Smart Brothers, Ltd.* v. *Ross*, [1942] Ch. 158, at p. 177, C.A. The actual decision was reversed in the House of Lords.

The judiciary are entrusted with the duty of administering the law, and in that respect are not to be interfered with nor are they entitled to encroach upon the functions of the executive. The statute has been passed, the contract made, the deed delivered or the will duly executed. The question is: what do the words mean, having regard to the declared intention, in the circumstances in which the document came into existence and to which it is to be applied. Whether the answer may or may not suit the executive has nothing to do with the matter.[1] But, in regard to any such document, the Court, whether applying a strict or a liberal meaning to words, is not entitled either to disregard the plain meaning of words or to give to doubtful words a meaning which they do not bear.

Law to be applied

In this country, in the absence of any rule to the contrary, English law applies to all instruments, and, in any case where some other system applies, evidence is needed as to the relevant provisions of that other law. In many cases our law lays down imperative rules that must be applied in determining the proper law of the instrument, but, speaking generally, the parties may decide what law is to apply. In such cases, where the intention is not clearly expressed, the Court must determine the intention of the parties from the terms of the instrument having due regard to surrounding circumstances and the subject-matter. This is a part of interpretation. When a foreign system of law is applicable, it may be that not only the rules of law of that system are to be ascertained and applied but also the foreign principles of interpretation, which are not necessarily the same as in this country. It has been suggested, indeed, that our habit of applying our own rules of interpretation to international treaties has sometimes been a cause of friction with other states where the rules of interpretation are much less strict.

Functions of Judge and Jury

It is for the judge to interpret the document, even when he is assisted by a jury, and the jury are bound to accept and follow the judge's direction upon the construction of the document.[2] This

[1] *Re Robb's Contract*, [1941] Ch. 463, at p. 479, which shews that even the views of the Government department administering a statute are not admissible for the purpose of interpreting that statute. The actual decision has been reversed by statute (Finance Act, 1942, s. 44). Similarly the Schedule of Reserved Occupations and an explanatory memorandum issued without statutory authority by the Minister charged with carrying out the National Service (Armed Forces) Act, 1939, do not affect the rights or duties of subjects under that Act (*Roeder* v. *Bevin*, [1942] 2 All E. R. 90).

[2] *Hutchison* v. *Bowker* (1893), 5 M. & W. 535, at pp. 540, 542; *Hill* v. *Evans* (1862), 4 De G. F. & J. 288, at p. 294; *Bowes* v. *Shand* (1877), 2 App. Cas. 455, at p. 462; and *Turner* v. *Sawdon & Co.*, [1901] 2 K. B. 653, at p. 656.

is not the case where an act in law is partly oral and partly in writing, or in the case of libel which has been declared to be a matter for the jury by Fox's Libel Act.[1] The judge decides whether the words are capable of bearing the alleged defamatory meaning but the jury decides whether they do in fact bear such meaning.

Whenever evidence is admissible in order to assist interpretation, such as evidence of commercial usage or of the meaning of technical words, and a jury is empanelled, it will be for the jury (except as to foreign law) to find whether the usage exists or the words have a special meaning and what that meaning is; but, when they have given their finding, it will still be for the judge to construe the document.[2] Although foreign law is treated as a matter of fact to be established by the evidence of experts, the judge both finds what that law is and applies it to the construction of the document.

The Court therefore considers the document and declares the meaning of the words used.[3] The Court does not decide what was probably intended to be there, or what ought to have been there, or would have been there if the parties had thought about the matter or had been properly advised. It interprets the document and has no right to replace it by one of its own devising.[4] It can therefore only place upon the words used a meaning that they will bear. If the Court steps beyond this line, it is no longer interpreting the document, it is making a document for the parties,[5] and judges have no right to make documents for the parties but only to interpret the documents that the parties have made.[6] "I have to construe what is in the charter-party, not what the owners would prefer to be there."[7] There is a clear distinction to be drawn between an imperfect expression of intention and a failure to express any intention at all. In the former case, the Court will endeavour to see whether it is possible to ascertain the intention thus imperfectly expressed: in the latter case, it has no right to make an instrument for the party or parties.

Dictionaries and Works of Authority

The judge may, as in all cases where the Court takes judicial notice, assist his memory as to the meaning of particular words

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[1] 10 Halsbury's Statutes 401.

[2] See the cases last cited, and *Skull* v. *Glenister* (1864), 16 C. B. (N. S.) 81, at p. 101.

[3] *Re Freeman, Hope* v. *Freeman*, [1910] 1 Ch. 681, at p. 691.

[4] *Wear River Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 764; *Higgins* v. *Dawson*, [1902] A. C. 1, at p. 6; *Elliott* v. *Crutchley*, [1906] A. C. 7, at p. 9.

[5] See *Gibson* v. *Minet* (1791), 1 Hy. Bl. 569, *per* EYRE, C.B., at p. 615.

[6] *See Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] A. C. 108, at p. 137.

[7] *Hector S. S. Co.* v. *V. O. Sovfracht, Moscow*, [1945] K. B. 343, *per* ATKINSON, J., at p. 349.

by referring to a dictionary [1] or standard authors.[2] A dictionary must be used with care. It is not an authoritative exposition of the meaning of words used in a document, but, as there is a well known rule that words are to be taken in their ordinary sense, the judge may have recourse to a dictionary to assist him.[3] Lord MACNAGHTEN has declared that the opinion of judges of acknowledged authority is probably a safer guide than any definition or illustration in a dictionary.[4] Etymology does not weigh as against current popular use,[5] and indeed is often an unsafe guide.[6] For technical terms, reference may be made to technical books.[7]

Interpretation involves (i) the identifying of the persons and things with reference to which the instrument is made; (ii) ascertaining the intention of the instrument in reference to such persons and things. It is the meaning and application of the words in that relationship that is material.

Evidence, Cases, and Canons of Construction

In certain cases, evidence is admissible to assist interpretation; decided cases on similar documents, words or phrases may be referred to by way of illustration or analogy; and in every case the judge will be assisted by the rules or canons of construction which have been established by statute or judicial pronouncement for his guidance in the interpretation of documents. These matters are dealt with in the following Chapters.

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[1] *Matthew* v. *Purchins* (1608), Cro. Jac. 203; *Blandford* (*Marchioness*) v. *Marlborough* (*Dowager Duchess*) (1743), 2 Atk. 542, at p. 545; *A.-G.* v. *Cast-Plate Glass Co.* (1792), 1 Anst. 39, at p. 44; *Re Rayner*, *Rayner* v. *Rayner*, [1904] 1 Ch. 176, at pp. 187, 188; *Nairne* v. *Stephen Smith & Co.*, [1943] 1 K. B. 17, at p. 21.

[2] *Camden* v. *Inland Revenue Commissioners*, [1914] 1 K. B. 641; affirmed *sub nom. Inland Revenue Commissioners* v. *Camden*, [1915] A. C. 241.

[3] *R.* v. *Peters* (1886), 16 Q. B. D. 636, at p. 641; cf. *Spillers, Ltd.* v. *Cardiff Assessment Committee*, [1931] 2 K. B. 21, at p. 42; *Kerr* v. *Kennedy*, [1942] 1 K. B. 409, at p. 413; *Makin* v. *London and North Eastern Rail Co.*, [1943] 1 All E. R. 362, at p. 363.

[4] *Midland Rail. Co. and Kettering, Thrapston and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19, at p. 34.

[5] *Re Alcock*, *Bonser* v. *Alcock*, [1945] Ch. 264, at pp. 268, 269.

[6] *E.g.* as to "sewer" (see *Sutton* v. *Norwich Corporation* (1858), 27 L. J. (Ch.) 739, *per* KINDERSLEY, V.-C., at p. 742; and as to "securities," *Re Johnson*, *Greenwood* v. *Greenwood* (1903), 47 S. J. 547, *per* KEKEWICH, J., at p. 547; affd. (1903), 89 L. T. 520).

[7] See *e.g. Re Castioni*, [1891] 1 Q. B. 149, at p. 165.

CHAPTER II

EVIDENCE IN RELATION TO INTERPRETATION

(*a*) ADMISSIBILITY GENERALLY

Purposes for which Evidence admissible

EVIDENCE is always admissible in order to assist interpretation, but the purposes for which evidence is admissible are strictly limited. The Court has to take care that evidence is not used to complete a document which the party has left incomplete or to contradict what he has said, or to substitute some other wording for that actually used, or to raise doubts, which otherwise would not exist, as to the intention. When evidence is admitted in connection with interpretation, it is always restricted to such as will assist the Court to arrive at the meaning of the words used, and thus to give effect to the intention so expressed.

What Evidence admitted

Evidence is admissible:

(*a*) Of the surrounding circumstances;
(*b*) Of the identity of the persons or things with reference to which the document is to operate;
(*c*) Of other matters necessary to enable the judge to read or understand the document;
(*d*) Of facts which either (i) show that a term is to be implied; or (ii) show that a secret trust is to be imposed; or (iii) rebut a presumption of fact which *prima facie* arises by construction.

It is only in relation to these matters that evidence is admitted, and even then not every kind of evidence. This is so firmly established that it is usual to express the principle in a negative form, that evidence is not admitted save in particular cases; for the reason that such evidence is not admissible in order to prove the intention of a party but to instruct the mind of the judge so that he may understand and apply the words used.

Evidence not to conflict with Document

Where the intention of the parties has been reduced into writing, either because the law requires it to be expressed in writing or because the parties have accepted the writing as a complete

expression of their intention, external evidence is not in general admitted either to show such intention or to contradict, vary, add to or subtract from the wording of the document.[1] " No extrinsic evidence of the intention of the party . . . from his declarations, whether at the time of his executing the instrument or before or after that time, is admissible ; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written." [2] This principle has nothing to do with rectification, which is a remedy applicable when by mutual mistake the writing is not a complete or accurate expression of the intention. Evidence to support a claim for rectification is admissible on a different principle to that which applies to the interpretation of the document, and is akin to the rules which apply to an attack on the authenticity of a document. Of course, if rectification is granted, the problem of interpretation deals with the document as rectified.[3]

Cases on the application of the principle that external evidence is not admissible are numerous. The following are examples:

A lease provided that the rent should be payable quarterly in advance. The lessee was not allowed to give evidence of an oral agreement that payment should be effected by three months' bill.[4] It is obvious that payment by a three months' bill is almost a direct contradiction of the term that the quarter's rent should be paid in advance.

A lease provided that a specified rent should be paid. The lessor was not allowed to prove an oral agreement that an additional rent should be paid,[5] nor could evidence of any other oral agreement relating to the subject-matter of the lease be admitted.[6]

A contract of sale of goods described the quality of the goods but made no mention of any sample. Evidence was not admitted to prove that it was a sale by sample.[7]

A written contract was in such words that, by construction, the agent who made it was personally liable. Evidence could not be admitted to show that the parties did not intend that result.[8]

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[1] *Goss* v. *Nugent* (1833), 5 B. & Ad. 58 ; *Countess Rutland's Case* (1604), 5 Co. Rep. 25b ; *Tsang Chuen* v. *Li Po Kwai*, [1932] A. C. 715.

[2] *Per* PARKE, B., in *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at p. 556.

[3] *United States* v. *Motor Trucks, Ltd.*, [1924] A. C. 196.

[4] *Henderson* v. *Arthur*, [1907] 1 K. B. 10.

[5] *Preston* v. *Merceau* (1779), 2 Wm. Bl. 1249.

[6] *Jones* v. *Lavington*, [1903] 1 K. B. 253.

[7] *Tye* v. *Fynmore* (1813), 3 Camp. 462.

[8] *Higgins* v. *Senior* (1841), 8 M. & W. 834 ; *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*, [1915] A. C. 847 ; but see *Wake* v. *Harrop* (1862), 1 H. & C. 202.

Written or printed conditions of sale cannot be varied by evidence of statements made by the auctioneer.[1]

Negotiable instruments cannot be varied in their legal effect, *e.g.* by evidence of an agreement to renew [2] or to deposit securities to be sold if the bill is not met,[3] or not to demand payment until after certain property has been sold,[4] or otherwise in variation or defeasance of the instrument.[5]

In all these instances the agreement between the parties had been reduced into writing and the evidence, if admitted, would have either contradicted or varied or added to or subtracted from the plain meaning of the written document.

Evidence not to contradict Term implied by Law

This rule applies whether the meaning which is not to be impugned by external evidence arises either, as in the preceding examples, by construction of the wording of the document or by reason of the fact that the law implies a term when the document is silent. Thus a written agreement for service at a weekly salary without mentioning any period is by implied term a weekly hiring and evidence will not be allowed to show that it is intended to be a yearly hiring.[6] A written contract of sale which makes no mention of credit is one for immediate payment against goods and evidence that it is not intended to be such is not admissible.[7] Where the demise of a room is unambiguous, parol evidence is not admissible to shew that it does not include the external walls.[8] Unless expressly otherwise provided, a demise of a room impliedly includes the walls. A lease which makes no mention of taxes, leaves them to lie where they fall and consequently evidence is not admitted to show that the lease is to be free of all taxes.[9]

(*b*) SURROUNDING CIRCUMSTANCES

Evidence always admissible

Although the Court ascertains the intention from the words used, the imperfection of language, and the fact that the meaning of words varies according to the circumstances in respect of which

[1] *Gunnis* v. *Erhart* (1789), 1 Hy. Bl. 289; cf. *Brett* v. *Clowser* (1880), 5 C. P. D. 376; *Whurr* v. *Devenish* (1904), 20 T. L. R. 385.

[2] *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487.

[3] *Abrey* v. *Crux* (1869), L. R. 5 C. P. 37.

[4] *Free* v. *Hawkins* (1817), 8 Taunt. 92; cf. *Moseley* v. *Hanford* (1830), 10 B. & C. 729.

[5] *Hitchings* v. *Northern Leather Co.*, [1914] 3 K. B. 907.

[6] *Evans* v. *Roe* (1872), L. R. 7 C. P. 138.

[7] *Ford* v. *Yates* (1841), 2 Man. & G. 549.

[8] *Goldfoot* v. *Welch*, [1914] 1 Ch. 213.

[9] *Rich* v. *Jackson* (1794), 4 Bro. C. C. 514, at which date statutory provision against agreements shifting the burden of taxation was not usual.

they are used, often render it impossible to know what that intention is without inquiring further and seeing what those circumstances were and what was the object, appearing from those circumstances, which the person using the words had in view.[1] Evidence of these circumstances is always admissible. This is a general rule applicable to all written instruments.[2]

Purpose of Evidence

This evidence is directed only to inform the Court so that it may understand the document and declare what it means. It cannot be used to supplement or amend the document. "The natural meaning of 'stocks and shares' is stocks and shares in limited companies, and the only use I make of circumstances in the present case is to come to the conclusion that I find nothing in them to extend that natural meaning."[3]

The Court will in the first instance require to know who are the persons and what are the places and things with reference to which the document speaks. The amount of information that is material varies with the documents under consideration. A contract of sale normally does contain a statement sufficient to inform the Court without any, or at least without much, detailed evidence. In construing a will the Court will normally require to know what the family of the deceased was and what property he left. If the will is clearly and properly drawn, the Court will then be in a position to expound its provisions. Whenever that is the case, the Court has all the necessary materials before it, and further evidence becomes unnecessary.

This information however may not be sufficient, and indeed may itself raise doubts which were not perceived before (latent ambiguities). Whenever, therefore, the Court needs more information as to the surrounding circumstances, evidence will be admitted. Many of the decisions which appear to conflict can be explained by the fact that in one case the Court had, and in another case it had not, sufficient information, and many cases can be explained by the fact that the party tendering the evidence was attempting to pass the bounds of interpretation.

Negotiations not admitted

Thus previous negotiations or subsequent declarations of the parties are not admissible to affect the construction.[4] The course which a Bill followed in Parliament cannot be admitted to control

[1] See *per* Lord BLACKBURN in *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763.

[2] *Hart* v. *Hart* (1881), 18 Ch. D. 670, at p. 693.

[3] See *per* COHEN, J., in *Re Everett, Prince* v. *Hunt*, [1944] Ch. 176, at p. 179.

[4] *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at pp. 556, 565–567.

the construction of the Act which thereby came into existence.[1] A statute speaks with the voice of the three Estates of the Realm and the meaning which the draftsman or any member attaches to it cannot affect its construction and effect[2]; and, if its language differs from the avowed intention of its promoters, the inference is rather that the departure is intentional on the part of Parliament.[3] No matter who puts forward a Bill, the Act which emerges is what Parliament judges to be the right provision to be made, whether it carries out the original intention of the promoters or proposers or not.[4]

Negotiations leading to a contract or conveyance are clearly inadmissible for this purpose.[5] This principle excludes any drafts

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[1] *R.* v. *Hertford College* (1878), 3 Q. B. D. 693; *Administrator-General of Bengal* v. *Prem Lal Mullick* (1895), L. R. 22 Ind. App. 107, at p. 118; *Hollinshead* v. *Hazelton*, [1916] 1 A. C. 428; *Viscountess Rhondda's Claim*, [1922] 2 A. C. 339; but see *South Eastern Rail. Co.* v. *Railway Commissioners* (1880), 5 Q. B. D. 217, at p. 236; and *R.* v. *Bishop of Oxford* (1879), 4 Q. B. D. 525, at p. 550.

[2] *Re Dean of York* (1841), 2 Q. B. 1. "It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible" (*Assam Railways, etc. Co.* v. *Inland Revenue Commissioners*, [1935] A. C. 445, at p. 458). So, also, a statement made in Parliament as to the effect of statutory provisions is not admissible (*Re R.*, [1906] 1 Ch. 730, at p. 733).

[3] See *per* TINDAL, C.J., in *Salkeld* v. *Johnson* (1846), 2 C. B. 749, at p. 757; and cf. *Davis* v. *Taff Valley Rail. Co.*, [1895] A. C. 542 (proceedings before a Parliamentary Committee); *Assam Railways and Trading Co.* v. *Inland Revenue Commissioners*, [1935] A. C. 445, at p. 458 (report of a Royal Commission); and *Liversidge* v. *Anderson*, [1942] A. C. 206, at pp. 270, 271.

[4] "Which of these opinions was right can only be determined by referring to the language of the Legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing at what Parliament had in its mind, excepting so far as the language enables us to do so," *per* Lord HALDANE, C., in *Local Government Board* v. *Arlidge*, [1915] A. C. 120, at p. 130. "We are told that the new code embodies a compromise effected by the parties interested . . . but, if it be correct, it cannot affect the question of construction. This much, however, it is permissible to say, that the Legislature, for reasons which appeared to it to be sufficient, imposed a new code under which each party lost certain of the privileges which it had previously enjoyed and received privileges to which it was not previously entitled" (*B.A. Collieries, Ltd.* v. *L. & N.E. Rail. Co.*, [1944] Ch. 243, *per* Lord GREENE, M.R., at p. 250). The fact that it was a compromise was, however, relied on in the House of Lords; see *L. & N.E. Rail. Co.* v. *B.A. Collieries, Ltd.*, [1945] A. C. 143.

[5] *Attwood* v. *Small* (1838), 6 Cl. & Fin. 232; *London Corporation* v. *Sandon* (1872), 26 L. T. 86; *Prison Commissioners* v. *Middlesex Clerk of the Peace* (1882), 9 Q. B. D. 506, at p. 511; *British Equitable Assurance Co.* v. *Baily*, [1906] A. C. 35; *Millbourn* v. *Lyons*, [1914] 2 Ch. 231.

that may have been prepared,[1] such as a draft will,[2] or instructions for a will,[3] or letters written by the testator,[4] or revoked wills,[5] or even a revoked clause in a will otherwise unrevoked,[6] or any other papers or statements of the testator,[7] though such documents may be admissible for other purposes, *e.g.* to prove identity.[8] In all these cases, the material point is that the document under consideration has come into existence as the final expression of the intention of the party or parties. If the preliminaries were admissible so as to affect the construction of the final form, the object of reducing the agreement, etc., into writing would be nullified. It would never be possible to attain finality, and a real risk would be run of not giving proper effect to a change of intention. These considerations do not apply in the case of a transaction which has not been completely recorded in writing, and therefore depends wholly or partly on evidence of what was said or done, or in the case of a subsequent variation.

Contract merged in Deed

Similarly, where a contract has been merged in a deed, or a preliminary agreement replaced by the definitive contract, the earlier document cannot be admitted so as to affect the construction of the deed or final contract.[9] Thus the conditions of sale or agreement for sale cannot affect the construction of the parcels in the conveyance, either to enlarge[10] or to restrict[11] them or to import a reservation into them.[12] A debenture cannot be interpreted by reference to the prospectus.[13] A counterpart is not on the same footing. If properly proved, it is a duplicate original and can

[1] *National Bank of Australasia* v. *Falkingham & Sons*, [1902] A. C. 585, at p. 591.

[2] *Miller* v. *Travers* (1832), 8 Bing. 244; *Bradshaw* v. *Bradshaw* (1836), 2 Y. & C. (Ex.) 72.

[3] *Towers* v. *Moor* (1689), 2 Vern. 98; *Drake* v. *Drake* (1860), 8 H. L. Cas. 172.

[4] *Bernasconi* v. *Atkinson* (1853), 10 Hare, 345, at p. 354.

[5] *Richardson* v. *Watson* (1833), 4 B. & Ad. 787.

[6] *Choa Eng Wan* v. *Choa Giang Tee*, [1923] A. C. 469; cf. *Re Northcliffe, Arnholz* v. *Hudson*, [1925] Ch. 651, at p. 654.

[7] *Bertie* v. *Falkland* (1698), 1 Salk. 231; *Re Brady, Wylie* v. *Ratcliff* (1919), 147 L. T. Jo. 235.

[8] *Re Ofner, Samuel* v. *Ofner*, [1909] 1 Ch. 60, and see *post*, p. 27.

[9] *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, at p. 311; but see *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, at p. 356, which shews that the rule does not apply to such parts of a preliminary contract as are not to be embodied in the deed and are therefore not found there.

[10] *Williams* v. *Morgan* (1850), 15 Q. B. 782.

[11] *Doe* d. *Norton* v. *Webster* (1840), 12 Ad. & El. 442.

[12] *Teebay* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1883), 24 Ch. D. 572.

[13] *Re Tewkesbury Gas Co.*, [1911] 2 Ch. 279; affirmed, [1912] 1 Ch. 1; but see *Jacobs* v. *Batavia and General Plantations Trust, Ltd.*, [1924] 2 Ch. 329.

always be looked at to clear up any doubt arising on the lease or other original deed.[1] In the same way, copies of an issue of a newspaper are all duplicate originals.

Declarations and Acts of Parties

The principle excludes declarations of the parties whenever made.[2] The law has required, or the parties have by their actions made, a document which completely states the transaction. If a party could put in evidence declarations made by him or any other party, either before or after the document came into existence, in order to nullify or qualify the meaning of the document, the object of reducing the transaction into writing would be as much defeated as it would be in the case of negotiations, etc.

There are numerous decisions in which the acts of the parties are said to be inadmissible, except as regards ancient deeds where the doctrine of *contemporanea expositio* permits such evidence. It is certain that the subsequent acts of the parties are not admissible where the meaning of the words is clear.[3] Such evidence has long been admissible in connection with ancient documents, not to affect or control the plain meaning of the words used, but when there is a doubt as to the construction,[4] *e.g.* where the words used are general and the evidence of acts done under the document prove the exact force of those general words,[5] or because words have changed their meaning,[6] or they are doubtful for some other reason.[7] The expression *contemporanea expositio* is not very apt, as modern usage is admissible for this purpose.[8]

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[1] *Matthews* v. *Smallwood*, [1910] 1 Ch. 777.

[2] *Lewis* v. *Nicholson* (1852), 18 Q. B. 503, at p. 510; *Doe* d. *Norton* v. *Webster*, *supra*; *Bruner* v. *Moore*, [1904] 1 Ch. 305, at p. 310; *Houlder Brothers & Co., Ltd.* v. *Public Works Commissioner*, [1908] A. C. 276.

[3] *Monro* v. *Taylor* (1848), 8 Hare, 51, at p. 56; *North Eastern Rail. Co.* v. *Hastings* (*Lord*), [1900] A. C. 260, at p. 263.

[4] *A.-G.* v. *Parker* (1747), 3 Atk. 576, *per* HARDWICKE, L.C., at p. 577; *A.-G.* v. *Drummond* (1842), 1 Dr. & War. 353, *per* SUGDEN, L.C., at p. 368 (affirmed (1849), 2 H. L. Cas. 838).

[5] *Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403, at p. 406; *Weld* v. *Hornby* (1806), 7 East, 195, at p. 199; *Waterpark* v. *Fennell* (1859), 7 H. L. Cas. 650.

[6] *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at p. 569; *Hastings* (*Lord*) v. *North Eastern Rail. Co.*, [1899] 1 Ch. 656, at p. 663; affirmed, [1900] A. C. 260.

[7] *Hastings* (*Lord*) v. *North Eastern Rail. Co.*, *supra*, at p. 661; *Doe* d. *Kinglake* v. *Beviss* (1849), 7 C. B. 456, at p. 504; *De la Warr* v. *Miles* (1881), 17 Ch. D. 535, at p. 573.

[8] *Dunbar Magistrates* v. *Roxburghe* (1835), 3 Cl. & Fin. 335, at p. 354; *Chad* v. *Tilsed*, *supra*; *Beaufort* v. *Swansea Corporation* (1849), 3 Ex. 413; and in *Laprairie* v. *Compagnie de Jésus*, [1921] 1 A. C. 314, at p. 323, the evidence, though ancient, was far from being contemporary with the ancient grant which was being construed.

Evidence of subsequent acts of the parties was used in connection with modern documents in *Watcham* v. *A.-G. of East Africa Protectorate*,[1] and it is possible that the numerous cases where such evidence has been excluded may be explained as being intended to prevent it being used to modify the clear meaning of the document and not to exclude it when that meaning is doubtful. Subsequent declarations, as distinct from acts, are however not admissible. Neither class of evidence can be used to countervail the plain language of a document, for usurpation cannot constitute a legal usage,[2] nor can any such usage be allowed to repeal a positive enactment.[3] A circular issued by the Commissioners of Inland Revenue as to the way in which a provision of the Finance Acts was being administered was rejected as an aid to interpretation in *Re Robb's Contract*,[4] where an inconvenient interpretation was declared to be the right one because the meaning of the words of the section was plain.[5]

Other Cases

Where the construction is doubtful the Court will have regard to the surrounding circumstances in order to avoid, if possible, attributing to the party or parties an unreasonable or capricious intention, but not to assist mere grammatical difficulties.[6]

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[1] [1919] A. C. 533 ; cf. *Van Diemen's Land* v. *Table Cape Marine Board*, [1906] A. C. 92, at p. 98 ; and *Lamb (W. T.) & Sons* v. *Goring Brick Co., Ltd.*, [1932] 1 K. B. 710, at pp. 717, 721.

[2] *Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403, at p. 406 ; *R.* v. *Varlo* (1775), 1 Cowp. 248, *per* MANSFIELD, L.C.J., at p. 250; and see *R.* v. *Lloyd* (1887), 19 Q. B. D. 213, at p. 216.

[3] *Lord Advocate* v. *Walker Trustees*, [1912] A. C. 95, at p. 103.

[4] [1941] Ch. 463, at p. 478 ; and see *Roeder* v. *Bevin*, [1942] 2 All E. R. 90.

[5] In *Colebrook* v. *Watson Investment Co.*, [1944] Ch. 387, a title depended on the question whether parties could waive the protection of the Courts (Emergency Powers) Act, 1914. It was argued that, as it had been decided under the similar wording of the Courts (Emergency Powers) Act, 1939, that they could not do so, the Court should not follow the cases under the 1914 Act which were to the contrary effect. VAISEY, J., said, at p. 395, " I see no sufficient reason for acceding to the suggestion that I should come to a decision which involves the proposition that the contemporary theory and practice with regard to the Act of 1914 were fundamentally mistaken and wrong. The idea of so belated an enlightenment does not at all attract me. I should be very reluctant to arrogate to this generation *ex post facto* a greater measure of wisdom on the subject of the Act of 1914 than was vouchsafed to the generation when it was in actual operation." This was argued in relation to the doctrine *stare decisis*, but approaches the rule under discussion here.

[6] *Higgins* v. *Dawson*, [1902] A. C. 1, at pp. 10, 11 ; *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. L. 543, at p. 561 ; *Belaney* v. *Belaney* (1867), 2 Ch. App. 138, at p. 142.

(c) Identity

General Principle

One of the most important uses of evidence of the surrounding circumstances is to enable the Court to identify persons and things to which the provisions of the document refer. The Court must know who is the person or what is the thing which is mentioned or described.[1] The mere fact that the document mentions a person or thing is no proof of his or its existence in fact.[2] Again, a patent ambiguity may vanish when the actual persons or things are ascertained. A mention of one of several, without indicating which one, causes an uncertainty which is incurable (unless election is possible) where there are several, but this uncertainty no longer exists when it is found that there is only one such person or one such thing. " One of my rings " is equivalent to " my ring " when a testator has only one. On the other hand, a mention of " my son John," which appears to designate a particular person accurately, fails to do so if in fact there are two or more who are named John,[3] or there is no such son but there was either a son of that name who died before the material date, or there is a son not so named but habitually called by that name, or a stepson, or a relative, or even a stranger in blood whom the testator used to designate by that description.

The Court has to apply the meaning of the words used to the facts. For this purpose, as already stated, the material surrounding circumstances can be used.[4]

The evidence, however, must be directed to making certain what is not certain. It will not be admitted to raise doubts as to the meaning which otherwise would not exist.[5] In the usual case, the Court, having received such evidence as is obviously material, attempts to construe the words used, and whether further evidence will be admitted as material depends upon the ability of the Court, without it, to declare what the meaning is.[6] Often, however, evidence which may prove not to be material is admitted *de bene esse* and used or rejected according to circumstances.[7]

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[1] *Bank of New Zealand* v. *Simpson*, [1900] A. C. 182, at pp. 187, 118; *Charrington & Co., Ltd.* v. *Wooder*, [1914] A. C. 71, at p. 77.

[2] *Evans* v. *Tripp* (1821), 6 Madd. 91; *Daubeny* v. *Coghlan* (1842) 12 Sim. 507.

[3] *Lord Cheyney's Case* (1591), 5 Co. Rep. 68a, at p. 68b.

[4] *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, *per* PARKE, B., at p. 555; *Sherratt* v. *Mountford* (1873), 8 Ch. App. 928, *per* JAMES, L.J., at p. 929; *Doe* d. *Preedy* v. *Holtom* (1835), 4 Ad. & El. 76, at p. 82.

[5] *Davies* v. *Powell Duffryn Steam Coal Co.*, [1920] W. N. 114; affirmed (1921), 91 L. J. (Ch.) 40.

[6] *Re Seal, Seal* v. *Taylor*, [1894] 1 Ch. 316, at pp. 322, 333.

[7] *Sayer* v. *Sayer* (1849), 7 Hare 377, at p. 381; on appeal (1851), 3 Mac. & G. 606.

A description which accurately fits a person will not by evidence be allowed to apply instead to some other person whom it does not accurately fit. It is when a description does not describe a person accurately, or there are several who answer the description but only one or some can be intended, that further evidence is admitted in order to ascertain the identity of the person or persons really intended. If, *e.g.*, there is a gift to A and the evidence shows that there is one person A who answers that description, evidence will not in general be allowed for the purpose of showing that the testator really meant someone else.[1] This was a case where a domiciled Scot left a legacy to the " National Society for the Prevention of Cruelty to Children." There is a Society with that exact name having headquarters in London and another Society having the same name with the addition of the word " Scottish," the headquarters of which were in Edinburgh where the testator lived. There were a number of circumstances which rendered it highly probable that the testator would have preferred to extend his bounty to the Scottish Society, but the will contained no indication other than the name which accurately fitted the other Society and which accordingly was held to be the legatee intended. If the name had not accurately described either Society, the circumstances in question would have been material evidence.

Where the description is not wholly accurate as to any person or thing, or is equally accurate as to several and the matter is therefore one of doubt, all the facts bearing upon the matter known to the maker or party or parties are material, and the scope of evidence is very wide indeed. Facts excluded as evidence of intention will be admitted for this purpose. Indeed, with regard to a will, the Court has been said to be entitled to put itself into the testator's arm-chair.[2] The field is narrower in the case of contracts, since in the case of a will a man is speaking his own thoughts about his own affairs, but in the case of a contract one person is using words to another (or rather both to one another) on a particular occasion about a particular subject matter and therefore *prima facie* the material facts are such as are known to both.[3] In the one case, the party is engaged in a soliloquy; in the other the parties are, as it were, speaking to one another, but the principle is identical,[4] though decided cases on wills are not useful in interpreting conveyances and contracts and *vice versa*.

In the same way, much trouble arises when, in applying an apparently clear provision, it is found that it applies equally to two or more persons or two or more places or things equally accurately or equally inaccurately. Then evidence is admissible

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[1] *N.S.P.C.C.* v. *Scottish N.S.P.C.C.*, [1915] A. C. 207.

[2] *Boyes* v. *Cook* (1880), 14 Ch. D. 53, *per* JAMES, L.J., at p. 56.

[3] See *per* BRETT, M.R., in *Re Cousins* (1885), 30 Ch. D. 203, at p. 210.

[4] See *Grant* v. *Grant* (1870), L. R. 5 C. P. 727, at pp. 728, 729; *Lewis* v. *Great Western Rail. Co.* (1877), 3 Q. B. D. 195, at p. 208; *Skelton* v. *Younghouse*, [1942] A. C. 571, at p. 579.

to show who or what was really meant.[1] Evidence, however, is not received where the doubt can be removed by construction.[2] If the Court in pursuing the matter finds that there is a person or thing answering the description then the enquiry ceases, unless two or more persons or things are so found, when the evidence is directed towards clearing up the ambiguity and not to ascertaining the identity. If the evidence leads to no result or fails to remove the ambiguity, the disposition in question fails, as it also fails in the absence of any such evidence.[3] Thus, where a legacy was left to the son and daughter of a man who had four sons and one daughter, the legacy failed as to the son, there being nothing to show which one was meant, and so the daughter who was clearly designated took the whole legacy.[4] In this connection no evidence, such as proving a copyist's mistake or declarations as to what was intended, will be admitted.

Ambiguity

If there is an ambiguity, other than as to identity, apparent on the document and the evidence of surrounding circumstances leaves that ambiguity still existing, then the ambiguity cannot be cleared up by evidence of intention.[5] Unless election is possible, such an impasse is curable by construction or not at all.[6] It has been said that a will is only ambiguous when it has been determined judicially that no interpretation can be placed on it.[7] An ambiguity which does not appear on the document but emerges on the production of evidence of surrounding circumstances is on a different footing. That is known as a latent ambiguity or equivocation, and can be removed by evidence.

Latent Ambiguity

Where the inquiry as to identity shows that there are two or more persons or things, one only being intended, but both or all equally included in the description, then the Court will admit

[1] *Bennett* v. *Marshall* (1856), 2 K. & J. 740; *Careless* v. *Careless* (1816), 1 Mer. 384, at p. 388; *Doe* d. *Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363, at p. 370; *In the Estate of Hubbuck*, [1905] P. 129; *Re Cheadle, Bishop* v. *Holt*, [1900] 2 Ch. 620.

[2] Cf. *Re Fish, Ingham* v. *Rayner*, [1894] 2 Ch. 83.

[3] *Re Jackson, Beattie* v. *Murphy*, [1933] Ch. 237, at p. 242; cf. *Strode* v. *Russel* (1707), 2 Vern. 621, at p. 624; on appeal *sub nom. Falkland* v. *Lytton* (1708), 3 Bro. P. C. 24.

[4] *Dowset* v. *Sweet* (1753), Amb. 175.

[5] *Saunderson* v. *Piper* (1839), 5 Bing (N. C.) 425, at p. 431.

[6] *Committee of London Clearing Bankers* v. *Inland Revenue Commissioners*, [1896] 1 Q. B. 222, at p. 227; *Clayton* v. *Lord Nugent* (1844), 13 M. & W. 200; *Grant* v. *Grant* (1870), L. R. 5 C. P. 727, at p. 732; but see *Smith* v. *Doe* d. *Jersey* (1821), 3 Bli. 290, at p. 393; and *Colpoys* v. *Colpoys* (1822), Jacob 451, at p. 463; cf. *In the Goods of De Rosaz* (1877), 2 P. D. 66.

[7] *Re Grainger, Dawson* v. *Higgins*, [1900] 2 Ch. 756, at p. 764; approved in House of Lords, *sub nom. Higgins* v. *Dawson*, [1902] A. C. 1, at p. 10.

evidence of intention; and in that respect the field is very wide. This topic is fully dealt with in the books on Wills and Deeds.

Mistake

It is always possible that a mistake has been made, but, though in certain cases it is permitted to prove that words were used by mistake, it is never permitted to prove that words were chosen and used because the party or draftsman made a mistake as to their meaning or effect in law.

Evidence cannot be brought in order to prove a mistake which is not apparent. In the case of a testator who by his will left the residue of his estate to the children of his sisters Estrella and Reyna, there being a third sister Rebecca who had children while Reyna was a professed nun who had taken another name in religion, as the will was clear Estrella's children took the residue.[1] But when from the document itself it appears that there has been a mistake, then evidence is admissible to show how the mistake arose so as to identify the true subject.[2] Evidence is, however, not received where the doubt can be resolved by construction. In *Re Fish, Ingham* v. *Rayner*,[3] the legacy was "to my niece E. W.", but neither testator nor his wife had a niece but the wife had two great-nieces of that name, one of whom was legitimate and one not, and consequently, on the rule that in the absence of indication to the contrary legitimate relatives alone are intended, the legitimate great-niece took; in *Re Jackson, Beattie* v. *Murphy*,[4] where one person was named, two legitimate persons answered the description and, evidence being therefore admissible to show who was really intended, evidence was also held to be admissible on behalf of an illegitimate claimant; and in *In the Goods of Ashton*,[5] the rule of construction that legitimate relatives alone are intended was excluded by the terms of the will itself and therefore evidence was admitted on behalf of legitimate and illegitimate claimants alike. But where the doubt cannot be resolved by construction evidence will be admitted in order to determine which person or what place or thing was really meant.[6]

[1] *Delmare* v. *Rebello* (1792), 3 Bro. C. C. 446; cf. *Re Ely, Tottenham* v. *Ely* (1891), 65 L. T. 452, where evidence was rejected when tendered to shew that by mistake the draftsman had named a person who had been dead for years before the will instead of his brother who was alive at that date.

[2] *Selwood* v. *Mildmay* (1797), 3 Ves. 306; *Lindgren* v. *Lindgren* (1846), 9 Beav. 358; *Re Jameson, King* v. *Winn*, [1908] 2 Ch. 111.

[3] [1894] 2 Ch. 83.

[4] [1933] Ch. 237.

[5] [1892] P. 83.

[6] *Bennett* v. *Marshall* (1856), 2 K. & J. 740; *Careless* v. *Careless* (1816), 1 Mer. 384; *Doe* d. *Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363, at p. 370; *Re Cheadle, Bishop* v. *Holt*, [1900] 2 Ch. 620; *In the Estate of Hubbuck*, [1905] P. 129; *Re Raven, Spencer* v. *National Association for Prevention of Consumption and other Forms of Tuberculosis*, [1915] 1 Ch. 673.

The case of wills and testamentary dispositions is exceptional. Such instruments must be executed in the manner laid down by statute, and the Probate Division determines what are the writings and words constituting such documents, while the Chancery Division determines their meaning and effect. Words included by mistake can be omitted from probate, but words omitted by mistake cannot be included, as the instrument would not then be executed as required by law. When the will or codicil falls to be interpreted, words cannot be included or excluded by evidence, but only by the rules of construction.

Time at which Identity ascertained

A deed or other instrument *inter vivos* applies *prima facie* to persons and things as at the date of delivery or execution, but the document may expressly or by reason of the context indicate some other date either fixed or contingent. A will on the other hand is not subject to the same rule. Persons are ascertained as at the date of the will,[1] but where the holder of an office is named as executor, the holder at the date of death is the executor [2] if there is someone then in existence who answers the description,[3] but here again by express provision or construction some other date may be substituted.[4] As to property a will speaks as at the date of death [5] unless some other date applies by express or implied provision in the will. The date at which the identity is to be ascertained may of itself solve an ambiguity or prevent one arising.

Relations

A reference to the relations of any person means *prima facie* only legitimate relations,[6] unless it is impossible for any legitimate relation to answer the description [7] or the instrument expressly or by implication includes or refers only to illegitimate relations.[8] This principle may have a considerable bearing on interpretation.

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[1] *Bullock* v. *Bennett* (1855), 7 De G. M. & G. 283, at pp. 285, 286.

[2] *Re Jones' Estate* (1927), 43 T. L. R. 324.

[3] *Lomax* v. *Holmden* (1749), 1 Ves. Sen. 290; *Amyot* v. *Dwarris*, [1904] A. C. 268.

[4] *Re Daniels* (1918), 87 L. J. (Ch.) 661; *Re Caledon, Almander* v. *Caledon*, [1915] 1 Ch. 150.

[5] Wills Act, 1837, s. 24; 20 Halsbury's Statutes 445. These considerations do not affect questions which turn upon the date when the will was made (see *Re Sebag-Montefiore*, [1944] Ch. 331, at p. 335).

[6] *Cartwright* v. *Vawdry* (1800), 5 Ves. 530; *Re Fish, Ingram* v. *Rayner*, [1894] 2 Ch. 83; *Re Hall, Hall* v. *Hall*, [1932] 1 Ch. 262. For a problem arising on the effect of the Legitimacy Act, 1926, see *Re Hoff, Carnley* v. *Hoff*, [1942] Ch. 298.

[7] *Hill* v. *Crook* (1873), L. R. 6 H. L. 265, and see *Dorin* v. *Dorin* (1875) L. R. 7 H. L. 568.

[8] *In the Goods of Ashton*, [1892] P. 83.

Names

Names are somewhat more definite than descriptions, but in themselves are really only a kind of description. Erroneous names can always be corrected.[1] A man may have changed his name,[2] and a woman does on marriage [3] and may do so on divorce.[4] Companies and associations may change their names or amalgamate and this will often cause uncertainty upon which evidence is admitted in order to prove identity. A man may validly execute a deed in the name by which he is known,[5] and even if the document misdescribes him and he signs his own name the execution is valid.[6] The same principle applies to misdescriptions which can be corrected by evidence.[7] The fact that the document describes someone or something by name or other description and no one or nothing exists that satisfies the description does not of itself nullify the provision. Evidence is admissible to show who or what is really designated. A wrong name or description is not void when it can be established who or what is meant. It is only when it is clear from the circumstances that the party (*e.g.* the testator) was not merely describing someone or something erroneously but was under the erroneous impression that such a person did exist or that he owned or was able to dispose of such a thing that the provision fails, for such an error goes beyond misdescription.[8]

Evidence confined to Identification

Where words coupled with the evidence of surrounding circumstances show the existence of a person or thing clearly described and a plain and unambiguous disposition the Court will not admit further evidence.[9] Thus, where a testator left a legacy to his brother M and to S his brother's son, there being three brothers each having a son S living at testator's death, evidence was not admitted to show which S was intended, as the Court was of opinion that the will clearly indicated S the son of M.[10] Still less will it

[1] *Shep. Touch.* 233; *Frankland* v. *Nicholson* (1805), 3 M. & S. 259, n., at p. 260.

[2] *Barlow* v. *Bateman* (1730), 3 P. Wms. 64; on appeal (1735), 2 Bro. P. C. 272.

[3] *Fendall* v. *Goldsmid* (1877), 2 P. D. 263.

[4] *Cowley* v. *Cowley*, [1901] A. C. 450.

[5] *Gould* v. *Barnes* (1811), 3 Taunt. 504.

[6] *Janes* v. *Whitbread* (1851), 11 C. B. 406.

[7] *Simmons* v. *Woodward*, [1892] A. C. 100, at p. 105; *Wray* v. *Wray*, [1905] 2 Ch. 349.

[8] *Waters* v. *Wood* (1852), 5 De G. & Sm. 717; *Delmare* v. *Rebello* (1792), 1 Ves. 412; *Re Ely, Tottenham* v. *Ely* (1891), 65 L. T. 452.

[9] *Horwood* v. *Griffith* (1853), 4 De G. M. & G. 700, at p. 708; *Re Trimmer, Crundwell* v. *Trimmer* (1904), 91 L. T. 26; *Choa Eng Wan* v. *Choa Giang Tee*, [1923] A. C. 469.

[10] *Doe* d. *Westlake* v. *Westlake* (1820), 4 B. & Ald. 57.

admit evidence to show that some person or property other than that which is plainly described was intended,[1] such as that a testator was in the habit of calling his great-niece his niece,[2] or that he used to call by the name of the A Estate not only that estate but also outlying lands not forming part of it,[3] or that he used to call certain freeholds his copyholds.[4] It is only where that evidence shows that the words are insensible or that there is a latent ambiguity that further evidence is admitted, as before explained.

Even then the Court does not allow evidence to show that the party or parties intended some person or thing other than the one designated by the name or description appearing in the document, such as that he knew other persons more intimately [5] or did not know much about the person named.[6]

Evidence, however, is receivable for the purpose of ascertaining the person or thing actually intended when the description is capable of applying to more than one person or thing,[7] either accurately [8] or only with some inaccuracy.[9] When such a state of affairs exists then every material fact relating to the person or thing in question becomes relevant,[10] and so does every fact known to the testator that may throw light as to the person or thing indicated—such as knowledge of names,[11] that a certain person was dead,[12] that a particular member of the family was amply provided for.[13] A man may be presumed to know the state of his own family, but not that of the family of a cousin or remoter relative.[14] The time at which such knowledge exists is at the date of the instrument, for it is the knowledge at that time that is material as to the person or thing indicated by the instrument. It is in this respect that evidence of negotiations and instructions and the like, which are excluded for the purpose of construction, are admitted for the purpose of identification.[15]

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[1] *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at p. 565.
[2] *Re Fish, Ingham* v. *Rayner*, [1894] 2 Ch. 83.
[3] *Doe* d. *Oxenden* v. *Chichester* (1816), 4 Dow. 65; *Homer* v. *Homer* (1878), 8 Ch. D. 758.
[4] *Doe* d. *Brown* v. *Brown* (1809), 11 East, 441.
[5] *Holmes* v. *Custance* (1806), 12 Ves. 279.
[6] *Re Corsellis, Freeborn* v. *Napper*, [1906] 2 Ch. 316.
[7] *Druce* v. *Denison* (1801), 6 Ves. 385.
[8] *Miller* v. *Travers* (1832), 8 Bing. 244, at pp. 247, 248.
[9] *Re Ray, Cant* v. *Johnstone*, [1916] 1 Ch. 461.
[10] *Anstee* v. *Nelms* (1856), 1 H. & N. 225, at pp. 232, 233; *Dashwood v. Magniac*, [1891] 3 Ch. 306, where the question arose as to the exact interest intended to be given.
[11] *In the Goods of De Rosaz* (1877), 2 P. D. 66; *Re Gregson's Trusts* (1864), 2 Hem. & M. 504.
[12] *Re Whorwood, Ogle* v. *Sherborne* (1887), 34 Ch. D. 446.
[13] *Hodgson* v. *Clarke* (1860), 1 De G. F. & J. 394.
[14] *Crook* v. *Whitley* (1857), 7 De G. M. & G. 490, at p. 496.
[15] *Re Ofner, Samuel* v. *Ofner*, [1909] 1 Ch. 60; *Doe* d. *Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363, at p. 368.

Evidence indicating improbability that certain persons were intended is not admissible unless a foundation is first laid by showing that there are other persons who might answer the description.[1]

Election

Where an ambiguity arises by reason of the fact that there is an alternative as to the thing or the interest in it, then the ambiguity may be resolved by election. The right to elect is exercised by the person who has to do the first act towards effectuating the provision, *e.g.* if the grantor is to hand over, he elects, but if the grantee is to come and take, he elects, unless of course the right to elect is expressly conferred, as when a testator by will gives to A such one of his pictures as he may select.[2] Where the provision is certain in amount or value and only uncertain as to the specific extent or quantity, then election can take place, but if it can only be reduced to certainty by assessment or some other means for which no provision is made then the uncertainty cannot be removed, *e.g.* all the trees that can be spared[3]; the necessary land for making a railway.[4] There is no such right of election as against the Crown.[5] Where a lease is expressed to be terminable before the end of the term but it is not stated by whom, the right is in the lessee.[6] Where a grant is made with an exception which can only be ascertained by election, the whole passes under the grant and the exception only operates when the election is made.[7] When a right of election is given to several people, the first election made by any of them stands.[8] An election by tossing or lot is valid.[9] Where a testatrix left a house each to her nephews and nieces, but did not specify which house each was to have or the order in which they should select, SIMONDS, J., held that the order should be determined by lot.[10]

Further Evidence inadmissible

When such evidence fails to solve the question, then no further evidence, such as a mistake in copying or a declaration by the testator or party as to what he had intended to do, is admissible.

[1] *Sherratt* v. *Mountford* (1873), 8 Ch. App. 928, at p. 931.

[2] *Heyward's Case* (1595), 2 Co. Rep., at p. 35a. An example is *Thomas* v. *Kensington*, [1942] 2 K. B. 181; where the plaintiff took an option to acquire one acre of the defendant's land, the acre to be selected by the defendant.

[3] *Mervyn* v. *Lyds* (1553), 1 Dyer 90a, at p. 91a.

[4] *Pearce* v. *Watts* (1875), L. R. 20 Eq. 492.

[5] *Hungerford's Case* (1585), 1 Leon, 30; *Brand* v. *Todd* (1618), Noy, 29; *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366, at p. 386; but see *Doe* d. *Devine* v. *Wilson* (1855), 10 Moo. P. C. C. 502.

[6] *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399, at p. 442.

[7] *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, at p. 539.

[8] *Heyward's Case* (1595), 2 Co. Rep. 35a.

[9] *Duckmanton* v. *Duckmanton* (1860), 5 H. & N. 219.

[10] *Re Knapton, Knapton* v. *Hindle*, [1941] Ch. 428.

Also, if no evidence at all is available the uncertainty cannot be removed and the provision is void.[1]

(*d*) Evidence to enable Court to understand Document

Translation

When a document is wholly or in part in a foreign language, a translation into English must be before the Court, and for that purpose evidence is necessary.[2] The Court, however, will always, if need be, look at the original,[3] because it is the original document, and not the translation, that is under consideration. The fact that the judge understands the foreign language does not dispense with a translation, admitted or proved. Translation is a matter of testimony, and a judge cannot give evidence. The proceedings of the Court are in English, other persons cannot be expected to understand the language and therefore to follow the proceedings, and the decision will be applied in the judge's absence, perhaps after his death. The records of the Court should therefore always include a properly authenticated translation of any document in a foreign language. The construction of such a document is, however, for the Court and not the witness, whether translator or expert in foreign law.[4]

Ciphers, Shorthand, etc.

The same rule is applied when the document is in cipher or shorthand or any other form which is not intelligible without expert assistance.[5] But mere bad handwriting is for the Court.[6] The Court may, however, need expert assistance.[7] The Wills Act, 1837, s. 21,[8] provides that no obliteration, interlineation or other alteration made in any will after the execution thereof shall

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[1] *Re Jackson, Beattie* v. *Murphy*, [1933] Ch. 237, at p. 242; cf. *Strode* v. *Russel* (1707), 2 Vern. 621, at p. 624; (on appeal) *sub nom. Falkland* v. *Lytton* (1708), 3 Bro. P. C. 24.

[2] *Di Sora* v. *Phillipps* (1863), 10 H. L. Cas. 624, at p. 633; *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at pp. 511, 555, 566; *Reynolds* v. *Kortright* (1854), 18 Beav. 417; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, at p. 82.

[3] *Re Cliff's Trusts*, [1892] 2 Ch. 229; *Re Manners, Manners* v. *Manners*, [1923] 1 Ch. 220; *De Beéche* v. *South American Stores*, [1935] A. C. 148.

[4] See cases cited above and *Stearine Kaarsen Fabrick Gonda Co.* v. *Heintzmann* (1864), 17 C. B. (N. S.) 56; *Russian Commercial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1923] 2 K. B. 630, at p. 643 (reversed on appeal, [1925] A. C. 112).

[5] *Kell* v. *Charmer* (1856), 23 Beav. 195; *R.* v. *Williams* (1838), 8 C. & P. 434.

[6] *Remon* v. *Hayward* (1835), 2 Ad. & El. 666.

[7] *Goblet* v. *Beechey* (1831), 2 Russ. & M. 624.

[8] 20 Halsbury's Statutes 444.

be valid or have any effect, except so far as the words or effect of the will before any such alteration shall not be apparent,[1] unless certain formalities are observed. For the purpose of deciding whether the words of the will are or are not apparent, the evidence of experts is admitted. Thus, where slips of paper had been pasted over several words, the evidence of an expert that by adopting a certain device he could read them was accepted by the Court and it was held that the words were apparent.[2] So also where an expert was able to read the names which had been written under other names which had been put there later.[3] Modern methods of deciphering documents, which from age or other causes have become illegible, necessarily involve the use of expert assistance.

Technical Words and Words having a Special Meaning

It is assumed, until the contrary appears, that words are ordinary English words, but there are words which obviously cannot be so regarded. Other words, some of which are in common use, have a special meaning in particular occupations or particular places. The general rule is that words are to be taken in their ordinary sense, but technical words are *prima facie* used in their proper or technical meaning.[4] The Court cannot know the exact significance of words used with a special meaning unless it is proved (if necessary) that they do bear a special meaning and what that meaning is. For this purpose the evidence of persons familiar with the occupation or locality and of books dealing with the subject-matter is admissible,[5] but not a general dictionary of the English language.[6] The evidence is limited to proving the general use of the word in the occupation or locality in question; not for the purpose of proving, *e.g.*, that in the particular document the draftsman intended to use the word in some sense other than its ordinary meaning.[7] Evidence is here not resorted to in order to resolve doubts; the Court is simply ascertaining the current use of the English language in the occupation or district. Therefore, its admissibility is not dependent upon any

[1] See *In the Goods of Hamer* (1943), 113 L.J. (P.) 31, where after execution an obliteration was made in the amount of legacies. The words left were clear and the words erased could not be read. It was held that there was a revocation within the exception to s. 21.

[2] *Ffinch* v. *Combe*, [1894] P. 191.

[3] *In the Goods of Brasier*, [1899] P. 36.

[4] *R.* v. *Castro* (1874), L. R. 9 Q. B. 350, at p. 360; (on appeal) *sub nom. Castro* v. *R.* (1881), 6 App. Cas. 229. The rules are the same for statutes as for other documents (*L.N.E.Rail. Co.* v. *Berriman*, [1946] 1 All E. R. 255, at pp. 260, 268).

[5] *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at pp. 511, 566; *Re North Western Rubber Co.*, [1908] 2 K. B. 907, *per* BUCKLEY, L.J., at p. 923; see *Twyford v. Manchester Corpn.* [1946] 1 All E. R. 621, at p. 624.

[6] *Houghton* v. *Gilbart* (1836), 7 C. & P. 701.

[7] *Shore* v. *Wilson*, *supra*, at pp. 514, 525, 566.

ambiguity in the document itself.[1] It is almost equivalent to using a translation.[2] Evidence is first given that satisfies the Court that the word or phrase has a technical or local meaning, and, upon that being accepted, the evidence as to the meaning is then adduced. When there is a jury, it is for the jury to say what the meaning is after considering that evidence.

Cases illustrating this principle are innumerable.

Thus " corn " has been held to include malt,[3] but an attempt to show that " iron " includes steel has failed.[4] In theatrical circles " years " has been held to mean " parts of years," [5] " theatrical performance suspended from any cause whatever " held to refer only to a general closing of theatres,[6] and the meaning of the word " re-engagement " has been held to be a question for the jury.[7] In a particular district " one thousand " rabbits was held to mean 1,200.[8] " In turn to deliver " will be construed according to the meaning of the phrase at the port of delivery.[9] " Level " has been given the meaning attached to it by miners in the neighbourhood.[10] " Wet " as applied to palm oil has the meaning it bears in the trade.[11] " Weekly account " in a building contract has been given the meaning it bears in the building trade.[12] Similarly with regard to finance, " Current rate of exchange for approved bills in London " means 90 day and not sight bills,[13] and " first class bill in London " means a particular class of bill.[14] There is, however, the limit that the evidence must explain, not contradict or vary, the terms of the document. Accordingly, the Court has refused to give a special meaning to " becoming insolvent " when it would contradict the deed[15]; evidence of a trade usage to include a grocer's shop which has a retail off beer licence in the term " beerhouse " has been rejected[16]; and evidence that the word " shipment " includes loading into railway trucks has

[1] See *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at pp. 511, 566. 567, where the words were used in a particular sense in a religious denomination; *Myers* v. *Sarl* (1860), 3 E. & E. 306; *Brown* v. *Byrne* (1854), 3 E. & B., at p. 716.

[2] *Grant* v. *Maddox* (1846), 15 M. & W. 737, at p. 746.

[3] *Moody* v. *Surridge* (1798), 2 Esp. 633.

[4] *Hart* v. *Standard Marine Insurance Co., Ltd.* (1889), 22 Q. B. D. 499.

[5] *Grant* v. *Maddox, supra.*

[6] *Blow* v. *Lewis* (1902), 19 T. L. R. 127.

[7] *Robey* v. *Arnold* (1898), 14 T. L. R. 220.

[8] *Smith* v. *Wilson* (1832), 3 B. & Ad. 728.

[9] *Robertson* v. *Jackson* (1845), 2 C. B. 412.

[10] *Clayton* v. *Gregson* (1836), 5 Ad. & El. 302.

[11] *Warde* (*Ward*) v. *Stuart* (1856), 1 C. B. (N.S.) 88.

[12] *Myers* v. *Sarl, supra.*

[13] *Gripaios* v. *Kahl Wallis & Co., Ltd.* (1928), 45 T. L. R. 161.

[14] *De Beéche* v. *South American Stores,* [1935] A. C. 148.

[15] *Biddlecombe* v. *Bond* (1835), 4 Ad. & El. 332; *Parker* v. *Gossage* (1835), 2 Cr. M. & R. 617.

[16] *Holt & Co.* v. *Collyer* (1881), 16 Ch. D. 718.

been rejected on the ground that it was inconsistent with the provisions of the contract; it would not explain but vary it.[1] Where by statute a word or expression is given a particular meaning unless the context otherwise permits or requires, the statutory meaning will be given unless, as a matter of construction, the Court decides that some other meaning is to be applied.

Foreign Law

No evidence will be received as to English legal technical terms.[2] Expert evidence is needed as to foreign law, which the judge, and not the jury will find.[3] When a document has to be construed in accordance with some system of foreign law, not only is evidence admissible of the terms of art and the rules of law applicable, but also of any rule of construction which that system would use in interpreting the document,[4] and the Court will place upon the document the construction which the foreign law requires. As a rule a will of moveable property is to be interpreted in accordance with the *lex domicilii*[5] unless the terms of the will otherwise provide expressly or by implication. Immoveables are governed by the *lex loci rei sitæ*[6] and therefore *prima facie* a will of immoveables will be interpreted in the manner in which the Courts of the country where the immoveables are situate would construe it.

(*e*) IMPLIED TERMS

Contracts

The expression "implied term" is used in different senses. Sometimes it denotes some term which depends on a rule of law, such as the terms which, unless excluded, the law imports in contracts to which the Sale of Goods Act, 1893,[7] or the Marine Insurance Act, 1906,[8] applies. The law also in some circumstances implies that a contract is to be dissolved if there is a vital change of conditions. There is also the power to imply particular terms. The presumption is against the adding to contracts of terms which the parties have not expressed, but there are cases where obviously

[1] *Mowbray, Robinson & Co.* v. *Rosser* (1922), 91 L. J. (K. B.) 524; and see *Palgrave, Brown & Son, Ltd.* v. *S.S. Turid*, [1922] 1 A. C. 397; *Rederi Akt. Acolus* v. *Hillas* (1926), 96 L. J. (K. B.) 186.

[2] *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at p. 512; *Smith* v. *Butcher* (1878), 10 Ch. D. 113.

[3] Supreme Court of Judicature Act, 1925, s. 102; County Courts Act, 1934, s. 94; *Lazard Brothers & Co.* v. *Midland Bank*, [1933] A. C. 289, at p. 298.

[4] *Di Sora* v. *Phillipps* (1863), 10 H. L. Cas. 624, at pp. 633, 639; *Mostyn* v. *Fabrigas* (1775), 1 Cowp. 161, at p. 174..

[5] *Re Fergusson's Will*, [1902] 1 Ch. 483, at p. 486.

[6] *Freke* v. *Carbery* (1873), L. R. 16 Eq. 461, at pp. 466, 467.

[7] 17 Halsbury's Statutes 612.

[8] 9 Halsbury's Statutes 851.

some term is to be implied if the intention of the parties is not to be defeated. The implication must arise inevitably to give effect to the intention of the parties.[1]

It is in the last sense that the phrase " implied term " is used here. The implication may arise from the words of the instrument, but not always so. The Court will only imply a term if, from the document or the surrounding circumstances, such a term is essential to the business efficacy of the transaction.[2] Reasonableness is not the test.[3] If the document will be effective without the term, no implication will be made.[4] Thus, if a builder completes a house and then sells it, there is no implied warranty that the house is properly constructed and fit for habitation,[5] but if a person enters into a contract to purchase a house which the vendor is to build or complete then such an implied warranty does arise.[6] In the one case the contract is to buy the house that is in existence whatever it may be, but in the latter case the contract is to build or complete a house for the purchaser who is therefore entitled to reasonable care and skill in the provision of proper materials and in the work: in the former case the implication is not essential to the business efficacy of the transaction, but in the latter it is.

Thus, if a party enters into an arrangement which can only take effect if a certain state of affairs continues, there is an implied term that he will do nothing of his own motion to put an end to that state of affairs.[7] Consequently, if a person employs another to work on commission terms, there is an implied term that the employer will continue his business so that commission can be earned,[8] but not where the contract is a mere agency and not

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[1] See *per* Lord WRIGHT in *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] A. C. 108, at p. 137; c.f. *per* Lord Greene, M.R., in *Greenhalgh* v. *Arderne Cinemas, Ltd.* [1916] 1 All E. R. 512, at p. 514.

[2] *The Moorcock* (1889), 14 P. D. 64; *Lamb* v. *Evans*, [1893] 1 Ch. 218; *Nickoll and Knight* v. *Ashton*, [1901] 2 K. B. 126. So also as to statutes; see p. 34.

[3] *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488.

[4] *Consolidated Goldfields of South Africa* v. *Spiegel* (1909), 100 L. T. 351; *Re Railway and Electric Appliances Co.* (1888), 38 Ch. D. 597; *Easton* v. *Hitchcock*, [1912] 1 K. B. 535; *French & Co.* v. *Leeston Shipping Co.*, [1922] 1 A. C. 451; *Howard Houlder and Partners, Ltd.* v. *Manx Isles S.S. Co.*, [1923] 1 K. B. 110; *Gaze (W. H.) & Sons, Ltd.* v. *Port Talbot Corporation* (1929), 93 J. P. 89.

[5] *Otto* v. *Bolton*, [1936] 2 K. B. 46.

[6] *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113; *Perry* v. *Sharon Development Co., Ltd.*, [1937] 4 All E. R. 390.

[7] *Stirling* v. *Maitland* (1864), 5 B. & S. 840, at p. 852, approved in *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, at pp. 271, 272.

[8] *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544; *Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109; *Warren & Co.* v. *Agdeshman* (1922), 38 T. L. R. 588.

service.[1] An actor who is engaged to act at a salary would in the ordinary course of events be entitled to an opportunity to appear even if the contract did not expressly so provide.[2] Agricultural leases are presumed to be made with reference to the custom of the country, unless that is negatived by the lease expressly or impliedly. Many of these customs are now embodied in statutes. Where the lease is silent, then the custom applies, *e.g.* tenant to be paid for seeds on leaving[3]; but when the lease excludes the custom or makes provisions inconsistent with it, then the custom is excluded. Thus where a lease set out what payments were to be made to the outgoing tenant, a customary payment not provided for was excluded,[4] and a provision that the tenant was to leave the land in the same state or submit to valuation excluded a custom to pay him for manure.[5]

A servant is bound to observe good faith towards his master during his service,[6] but a private inquiry agent does not impliedly warrant that his employees will keep secrecy after they leave his employment.[7]

A contract to make plates and print bank notes when required implies an obligation not to use the plates for an unauthorised purpose.[8] A contract by an entertainment company that a person shall be a life member does not import a term that the undertaking shall continue to exist.[9] An accepted tender does not imply any agreement that orders shall be given in accordance with the tender.[10] A contract to sell goods which the buyers are not to resell under a named price does not imply an undertaking by sellers that they will not sell to others under that price.[11] An obligation entered into by majority shareholders of a company to use their rights and exert their influence in favour of the other party does not extend so as to bind them to use their voting powers in order to satisfy an obligation of their own to the detriment of the minority shareholders.[12]

The rule applies also to statutes, but is used with great caution. " Qualifications which are not expressed can only be implied if they

[1] *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; cf. *Collier* v. *Sunday Referee Publishing Co., Ltd.*, [1940] 2 K. B. 647.

[2] *Herbert Clayton and Jack Waller, Ltd.* v. *Oliver*, [1930] A. C. 209.

[3] *Hutton* v. *Warren* (1836), 1 M. & W. 466.

[4] *Webb* v. *Plummer* (1819), 2 B. & Ald. 746.

[5] *Clarke* v. *Roystone* (1845), 13 M. & W. 752.

[6] *Robb* v. *Green*, [1895] 2 Q. B. 315; *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413.

[7] *Easton* v. *Hitchcock*, [1912] 1 K. B. 535.

[8] *Banco de Portugal* v. *Waterlow*, [1932] A. C. 452.

[9] *Re Royal Aquarium and Summer and Winter Garden Society, Ltd.* (1903), 20 T. L. R. 35.

[10] *Churchward* v. *R.* (1865), L. R. 1 Q. B. 173; *R.* v. *Demers*, [1900] A. C. 103.

[11] *Livock* v. *Pearson* (1928), 33 Com. Cas. 188.

[12] *General Asphalt Co.* v. *Anglo-Saxon Petroleum Co.* (1932), 48 T. L. R. 276.

are necessary to give effect to what the Legislature must have intended." [1]

Custom and Trade Usage

Trade or business usage or the custom of the country, which may be used to explain terms in a document, may also be used to annex terms which are not expressed.[2] This does not vary or contradict the contract. The parties contract with reference to known usages and customs and consequently do not trouble to write them down, but they are included by mutual understanding.[3] They will not be implied when they are inconsistent with or repugnant to the express terms of the contract.[4] The rule applies to all forms of trade and business and to all local usages and customs.[5] Thus usages have been implied [6] and rejected as inconsistent [7] in marine insurance; implied [8] and rejected as inconsistent [9] as between landlord and tenant; similarly implied [10] as to charter-parties; implied [11] and rejected [12] as between seller and buyer of goods, and in innumerable other cases.

In order to imply a term by usage or custom, there must be some circumstance which renders it proper to impute knowledge to the party. There may be evidence that he knew, but ignorance is no answer if the usage or custom is notorious. A person who undertakes dealings which require such knowledge cannot say that he is ignorant of matters which he ought to know [13] and a person who

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[1] *M'Mahon* v. *Lawson*, [1944] A. C. 32, *per* Lord WRIGHT, at p. 47; and see *Fendoch Investment Trust Co.* v. *Inland Revenue Commissioners*, [1945] 2 All E. R. 140, *per* Lord SIMONDS, at p. 144.

[2] *Spartali* v. *Benecke* (1850), 10 C. B. 212, at p. 272.

[3] *Brown* v. *Byrne* (1854), 3 E. & B. 703, at p. 715.

[4] *Aktieselskab Helios* v. *Ekman*, [1897] 2 Q. B. 83, at p. 87; *Barrow & Brothers* v. *Dyster* (1884), 13 Q. B. D. 635; cf. *Tansley* v. *Sainsbury* (1941), 57 T. L. R. 576, where a requirement to sell meat by weight was held to be imperative and inconsistent with a trade custom to weigh skewers with the meat.

[5] *Smith* v. *Wilson* (1832), 3 B. & Ad. 728, at p. 733.

[6] *Lethulier's Case* (1692), 2 Salk. 443; *Miller* v. *Tetherington* (1862), 7 H. & N. 954.

[7] *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 Tyr. 266; *Dickenson* v. *Jardine* (1868), L. R. 3 C. P. 639.

[8] *Wigglesworth* v. *Dallison* (1779), 1 Doug. (K. B.) 201.

[9] *Boraston* v. *Green* (1812), 16 East, 71; *Westacott* v. *Hahn*, [1918] 1 K. B. 495.

[10] *Aktieselskab Helios* v. *Ekman*, [1897] 2 Q. B. 83.

[11] *Produce Brokers Co., Ltd.* v. *Olympia Oil and Cake Co.*, [1917] 1 K. B. 320.

[12] *Mowbray, Robinson & Co.* v. *Rosser* (1922), 91 L. J. (K. B.) 524.

[13] *Noble* v. *Kennoway* (1780), 2 Doug. (K. B.) 510; Marine Insurance Act, 1906, s. 87; 9 Halsbury's Statutes 882. But this does not apply to persons such as a bank entering into transactions collateral to dealings in a trade or market (*J. H. Rayner & Co.* v. *Hambro's Bank, Ltd.*, [1943] K. B. 37.

deals on a market ought to inquire.[1] Where a usage is not notorious, then persons who are not cognisant of it are not bound.[2] But where the contract expressly mentions, without setting out, the usages or customs that are to apply, then the party will be bound by them even if he does not know what they are, as they are expressly made part of the contract and he ought to have enquired before signing or accepting it.

An agreement to pay interest on a loan may be implied from a course of dealing between the parties.[3]

(*f*) Secret Trusts

In certain cases when a gift by will is made, evidence is admissible to show that the donee is a trustee for certain purposes. This may be so when the gift is in form absolute[4] or upon trusts for purposes not stated in the will.[5] If it be proved by the admission of the donee[6] or by other evidence[7] that the trusts or purposes were communicated to the donee in the testator's lifetime[8] and accepted by him as being binding, which acceptance may be by silence,[9] and thereby induced the testator to make the gift or to leave it unrevoked, the donee will be held bound. An increase by codicil of an existing gift must be communicated.[10] The testator may of course make it clear that the trusts or conditions are not to be binding.[11] If the will shows that the gift is made upon trust and not beneficially, but the trusts are not duly proved, then the gift is upon trust for the persons entitled as residuary legatees or upon an intestacy as the case may be.[12] But a testator cannot in this way give himself power to make a testamentary disposition not executed as required by the Wills Act, 1837.[13] This rule is not so much

[1] *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425, at p. 429; and see *Forget* v. *Baxter*, [1900] A. C. 467; *Matveieff & Co.* v. *Crossfield* (1903), 19 T. L. R. 182; *McCowin Lumber, etc. Co. Incorporated* v. *Pacific Marine Insurance Co.* (1922), 38 T. L. R. 901.

[2] *Gabay* v. *Lloyd* (1825), 3 B. & C. 793; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802, at p. 818, and the cases last cited.

[3] *Re Anglesey, Willmot* v. *Gardner*, [1901] 2 Ch. 548; and see *Nelson (James) & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.*, [1908] A. C. 108.

[4] *Burney* v. *Macdonald* (1845), 15 Sim. 6; *Re Spencer's Will* (1887), 57 L. T. 519; cf. *Re Williams, Williams* v. *All Souls, Hastings*, [1933] Ch. 244.

[5] *Blackwell* v. *Blackwell*, [1929] A. C. 318.

[6] *Re Maddock, Llewellyn* v. *Washington*, [1902] 2 Ch. 220.

[7] *Podmore* v. *Gunning* (1836), 7 Sim. 644.

[8] *Re Boyes, Boyes* v. *Carritt* (1884), 26 Ch. D. 531.

[9] *Russell* v. *Jackson* (1852), 10 Hare, 204; *Moss* v. *Cooper* (1861), 1 John. & H. 352; *Re Williams, Williams* v. *All Souls, Hastings, supra*; *French* v. *French*, [1902] 1 I. R. 172, H. L.

[10] *Re Cooper, Le Neve Foster* v. *National Provincial Bank*, [1939] Ch. 811.

[11] *Podmore* v. *Gunning, supra.*

[12] *Re Hawksley's Settlements, Black* v. *Tidy*, [1934] Ch. 384.

[13] 20 Halsbury's Statutes 436. *Re Keen, Evershed* v. *Griffiths*, [1937] Ch. 236.

concerned with interpretation of the will as it is with the imposing of a trust upon the beneficiary such as might happen upon any disposition of property.

(*g*) Evidence to rebut Presumption of Fact

When a presumption of fact arises not from the words used in the instrument but from the facts of the case, then evidence is admissible to rebut the presumption and counter evidence is admissible to support it.[1] Where, however, the conclusion arises from construction, evidence is not admissible[2] because then the evidence would be to add to or alter the words of the document or to prove intention otherwise than by the words used,[3] and not to prove some fact rebutting the presumption, *e.g.* a feeling of personal obligation[4] or an explanation of some fact outside the document.[5] The rule only applies to a presumption properly so called. Rules of law and of construction are often loosely but erroneously so called.

Thus when a person signs and delivers a deed but retains it in his possession, it is a valid deed operating immediately in the absence of evidence to rebut the presumption by showing that it is being held as an escrow.[6] Such evidence, however, cannot relate to facts after delivery, as the deed would then have become operative and subsequent facts cannot undo what has already been done.[7] Whether a document has been delivered as an escrow or as a deed is a question of fact and does not depend upon the words used, but on the circumstances as a whole.[8] So alterations and interlineations in a deed are presumed to have been made before execution,[9] and evidence is admissible to rebut this presumption. Alterations in a will must be executed in the same way as the will, or the signature of the testator and the witnesses be made opposite or near the alteration or a memorandum be written referring to them and similarly signed.[10] The Court will hear evidence, the onus being on the person who seeks to show that an unattested alteration of a will was made before execution,[11] for which purpose

[1] *Hurst* v. *Beach* (1821), 5 Madd. 351, at p. 360.

[2] *Coote* v. *Boyd* (1789), 2 Bro. C. C. 521, at p. 527; *Barrs* v. *Fewkes* (1865), 34 L. J. (Ch.) 522.

[3] *Re Tussaud's Estate, Tussaud* v. *Tussaud* (1878), 9 Ch. D. 363, at p. 374.

[4] *Re Shields, Corbould-Ellis* v. *Dales*, [1912] 1 Ch. 591, at pp. 599, 600.

[5] *Hall* v. *Hill* (1841), 1 Dr. & War. 94, at p. 116.

[6] *Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671, at p. 692; cf. *Macedo* v. *Stroud*, [1922] 2 A. C. 330.

[7] *London Freehold and Leasehold Property Co.* v. *Suffield*, [1897] 2 Ch. 608, at p. 621.

[8] *Furness* v. *Meek* (1857), 27 L. J. (Ex.) 34, at p. 37.

[9] *Simmons* v. *Rudall* (1851), 1 Sim. (N. S.) 115, at p. 136.

[10] Wills Act, 1837, s. 21; 20 Halsbury Statutes 444; *Greville* v. *Tylee* (1851), 7 Moo. P. C. C. 320, at pp. 327–8.

[11] *In the Goods of Sykes* (1873), L. R. 3 P. & D. 26, at p. 27.

declarations of the testator made *before* but not *after* the execution will be admitted.[1] The presumption in regard to testamentary dispositions is therefore the opposite of the presumption in regard to deeds, but this merely affects the onus of proof.

There is a presumption that a debt is satisfied wholly or *pro tanto* by a legacy. This can be rebutted by evidence. But where the testator also directs that his debts and legacies shall be paid or that his debts shall be paid, this direction excludes the presumption and both debt and legacy are to be paid. As the presumption is excluded by construction of the words of the will, evidence is not admissible to the contrary.[2] Again, when two legacies are given in a will to a person for a reason which is given and is the same for both, the presumption is that the second is mere repetition, but that can be rebutted [3]; where, on the other hand, the two legacies are given by two different instruments the conclusion that they are cumulative arises by construction and is not a presumption, so that evidence is not admissible to rebut this.[4] Again, there used to be a rule that undisposed of residue of personalty went to the executor or executors beneficially, but if the will gave a legacy to the sole executor or equal legacies to each of the executors, then a presumption arose that such residue was to be held by them for the next-of-kin,[5] but as this was a presumption it could be rebutted by evidence.[6] When equal legacies were given to each of three executors and further legacies to each of two of them but not to the third, it was held that the presumption did not arise.[7] Now the executors hold the undisposed of residue for the Crown.[8]

Where a deceased person expresses, apart from his will, an intention of forgoing a debt or of giving some personal property to another who on the death becomes executor, then the rule is that if the intention remains unchanged the executor can hold beneficially. It is obvious that this cannot apply unless evidence of the facts is admissible.[9] The rule has been applied in an intestacy where the grant was held to perfect an imperfect gift to the administrator.[10]

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[1] *Re Jessop*, [1924] P. 221.

[2] *Lee* v. *Pain* (1845), 4 Hare, 201.

[3] *Hurst* v. *Beach* (1821), 5 Madd. 351; but see *Wilson* v. *O'Leary* (1872), L. R. 7 Ch. 448, at p. 455; and cf. *Re Smythies, Weyman* v. *Smythies*, [1903] 1 Ch. 259.

[4] *Hurst* v. *Beach, supra.*

[5] *Farrington* v. *Knightly* (1721), 1 P. Wms. 544.

[6] *Langham* v. *Sandford* (1816), 19 Ves. 641.

[7] *A.-G.* v. *Jefferys*, [1908] A. C. 411.

[8] Administration of Estates Act, 1925, s. 49 (b); 8 Halsbury's Statutes 352.

[9] *Re Stewart, Stewart* v. *McLaughlin*, [1908] 2 Ch. 251, at p. 255; *Re Stoneham, Stoneham* v. *Stoneham*, [1919] 1 Ch. 149.

[10] *Re James, James* v. *James*, [1935] Ch. 449.

Chapter III

CITATION OF AUTHORITY

Statutes and Judgments

Both statutes and judgments are sources of law, but with this difference: the actual words of an Act constitute the law and decisions upon their construction and effect and upon their application are authoritative [1]; whereas in the case of a judgment it is the *ratio decidendi* that constitutes the principle of law and that *ratio decidendi* may be expressly stated—either completely or, more usually, in relation to the issue before the Court—or may be left unstated and to be gathered by inference from the actual language of the judge and the effect of the decision. A rule of law may, therefore, properly and legitimately, be built up in a mosaic composed of a number of cases which amplify, correct and explain one another, and thereby the rule emerges in a complete form. It is a mistake, therefore, to interpret a judgment as though the words themselves constitute the law, and judges have often protested against general words used in one connection in a judgment being taken as an authority for a different set of facts which were not before the judge at the time and consequently were not in his mind.[2] The word "judgment" is here used to mean the judge's statement of his reasons. A judgment, in the sense of the order actually made in the proceedings, is a document subject to the rules of construction like any other document.

As, on the other hand, the very words of the statute constitute the law, it is what those words mean that is vital. Care must therefore be taken not to substitute judgments on a statute for the words of the statute. Thus it has been said with regard to the Workmen's Compensation Act, 1925,[3] "Most of the erroneous arguments put before the Courts in this branch of the law will be found to depend on disregarding the salutary rule that a test convenient in a particular case must not be allowed to dislodge the original words of the Act. I venture to add that the tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases

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[1] See *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] K. B. 718, *per cur.*, at p. 729 (affirmed [1946] A. C. 163).

[2] See, e.g., *Carter* v. *S.U. Carburettor Co., Ltd.*, [1942] 2 K. B. 288, at p. 292.

[3] 11 Halsbury's Statutes 513.

round a legislative measure which was intended to be administered rather than litigated upon." [1] But "in interpreting an Act of Parliament it is legitimate to take note of earlier judicial decisions which may throw light on, and help to explain, the terms of the enactment." [2]

When decisions have been given as to the interpretation of a statute, there are certain principles that are applied. "Firstly, the construction of a statute of doubtful meaning, once laid down or accepted for a long time, ought not to be altered unless [it can be said] positively that it was wrong and productive of inconvenience; secondly, those decisions upon which title to property depends, or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection; thirdly, decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments, needlessly made, or the position of the public materially affected, ought in the same way to continue." [3] Again, when a statute in replacing an existing statute which it repeals repeats without alteration the language of the former Act which has been judicially construed, then the same meaning will be given to that language in the new statute.[4] But, when "the Legislature has repealed a statute, and has not re-enacted it but replaced it with a new enactment in different terms, it is in general a salutary rule that such case law as has accumulated round the repealed statute should be regarded as having expired with it." [5]

Decisions on Similar Instruments

Apart from the decisions which lay down principles or canons of construction or construe statutes, the Court may consider other decisions upon similar documents, or clauses or words or phrases in such documents.[6]

This course is adopted only with very great caution. The construction put upon an instrument by a Court is not binding on

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[1] See *per* Lord WRIGHT in *Harris* v. *Associated Portland Cement Manufacturers* [1939] A. C. 71, at p. 89.

[2] See *per* Lord SIMON, C., in *Westminster Assessment Committee* v. *Conservative Club*, [1944] A. C. 55, at p. 60.

[3] *Per* Lord BUCKMASTER in *Bourne* v. *Keane*, [1919] A. C. 815, at p. 874. and see *Re Warden & Hotchkiss, Ltd.*, [1945] Ch. 270, at pp. 273–4.

[4] *Vickery* v. *Martin*, [1944] K. B. 679, at pp. 682–3, 684.

[5] *Westminster Bank, Ltd.* v. *Riches*, [1945] Ch. 381, *per* DU PARCQ, L.J., at p. 388.

[6] *Miles* v. *Harford* (1879), 12 Ch. D. 691, at p. 698; *Morgan* v. *Thomas* (1882), 9 Q. B. D., at p. 644; *Re Bright-Smith, Bright-Smith* v. *Bright-Smith* (1886), 31 Ch. D. 314, at p. 318; *Re Booth, Booth* v. *Booth*, [1894] 2 Ch. 282, at p. 285; cf. *Waite* v. *Littlewood* (1872), 8 Ch. App. 70, at p. 73

another Court, even of inferior jurisdiction, as regards the construction of another instrument couched in somewhat similar terms,[1] and even if the words are identical, the decision is not strictly binding.[2] Nevertheless, in the commercial world, agreements relating to a particular trade are made on standard forms; decisions upon the meaning of an agreement in a particular form are known and influence future transactions almost from the date of the judgment and consequently are very material. In this respect they resemble decisions as to the meaning of statutes rather than decisions on the construction of particular documents. "Cases of construction . . . are useful when they put an interpretation upon common forms—whether in deeds, wills, or mercantile documents." [3] "It is a wholesome rule . . . that when a well-known document has been in constant use for a number of years, the Court, in construing it, should not break away from previous decisions . . . because all documents made after the meaning of one has been judicially determined are taken to have been made on the faith of the rule so laid down." [4] But "unless the deed or written contract under consideration is a matter of common form—at least in respect of the particular provision which falls to be considered—it is dangerous to seek to apply to it the judicial interpretation of another document, unless that other document is so similar in its terms as to be almost identical." [5] With regard to particular instruments, therefore, previous cases can only be used by way of illustration or analogy, and are subject to the general observation, applying to decisions on fact or merely illustrating a rule, that there are few more fertile sources of fallacy than to erect a previous decision into a governing precedent merely because it contains what is simply resemblance of circumstances.[6]

JESSEL, M.R., stated the principle in these terms: "It is the duty of the judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before

[1] *Per* JESSEL, M.R., in *Re New Callao* (1882), 22 Ch. D. 484, at p. 488.

[2] *Per* JESSEL, M.R., in *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103, at p. 111.

[3] *Per* LINDLEY, L.J., in *Re Jodrell, Jodrell* v. *Seale* (1890), 44 Ch. D. 590, at p. 610; (on appeal) *sub nom. Seale-Hayne* v. *Jodrell*, [1891] A. C. 304.

[4] *Per* ESHER, M.R., in *Dunlop & Sons* v. *Balfour*, [1892] 1 Q. B. 507, at p. 518.

[5] See *per* SCOTT, L.J., in *Langstone* v. *Hayes*, [1946] K. B. 109, at p. 112.

[6] *Kreglinger* v. *New Patagonia Meat, etc. Co.*, [1914] A. C. 25, at p. 40.

you, that you do not think the difference sufficient to alter the construction, you miss the real point . . . which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the Judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result, especially in some cases of wills, has been remarkable. There is, first, document A, and a Judge formed an opinion as to its construction. Then comes document B, and some other Judge has said that it differs very little from document A—not sufficiently to alter the construction—therefore he construes it in the same way. Then comes document C, and the Judge there compares it with document B, and says that it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner." [1] And so BOWEN, L.J., said in *Evans* v. *Evans* [2]: "It is not a right principle of construction to say that one authority covers one point in the case before us and that another authority covers another point, and therefore a certain conclusion is to be come to. We must look at the document as a whole." The case is rather different where the same point of construction afterwards arises under the same document which has already been judicially construed. The Court should then follow the previous decision.[3]

It was said by KAY, L.J.,[4] that the true way to construe a will is to form an opinion apart from the cases, and then see whether the cases require a modification of that opinion; not to begin by considering how far it resembles other wills on which decisions have been given.[5] Even then the Privy Council has declared that

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[1] *Aspden* v. *Seddon* (1874), 10 Ch. App. 394, at pp. 397, n., 398, n. (affirmed on appeal (1875), 10 Ch. App. 394), and see *per* Lord WRIGHT in *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] A. C. 108, at p. 130.

[2] [1892] 2 Ch. 173, at p. 188; *Re Routledge, Marshall* v. *Elliott*, [1942] Ch. 457, at pp. 464, 465.

[3] *Re Lart, Wilkinson* v. *Blades*, [1896] 2 Ch. 788.

[4] *In re Tredwell, Jeffray* v. *Tredwell*, [1891] 2 Ch. 640, at pp. 659, 660.

[5] Similarly, Lord GREENE, M.R., has said: "The method which I adopt in considering the language of an Act of Parliament is, first, to try to construe the language of the Act in relation to the subject matter with which it is dealing, and, having done that, to see to what extent, if any (and very often it is to no extent at all), decisions on other Acts of Parliament, differently worded and relating to different subject matters, may be of assistance, in that they may contain some statement of principle that may be of assistance" (*R.* v. *Canterbury* (*Archbp.*), [1944] K. B. 282, at p. 291). See also *Re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939, at p. 941; *Re Williams, Metcalf* v. *Williams*, [1914] 1 Ch. 219, at p. 222;

with regard to wills "cases can be of but little use, for the words of one will are seldom the same as those of another." [1] SHADWELL, V.-C., expressed the view that "by the laws of this country every testator in disposing of his property is at liberty to adopt his own nonsense, and a decision on the expressions used by one testator seldom affords any clue as to the meaning of another." [2] COLLINS, M.R., has regretted the lamentable waste of judicial time and power in examining decisions with regard to the meaning of words which with one context are capable of one meaning and with another context of another meaning.[3] Nevertheless such decisions are binding when (1) they lay down principles of interpretation—a topic discussed in the next chapter—or (2) they state the meaning of words or phrases which have become terms of art or construe meanings attached to them by statute, but in such cases the meaning may be modified by the context of the document which is to be construed. Thus in many cases, the decisions of the Court have laid down the precise meaning of terms of art or of common words and phrases which are met with in documents based upon well-known and established precedents. These decisions are practically particular rules of construction relating to that class of document, and amount to a pronouncement as to the meaning to be given to a word or phrase in the absence of a context or other indication that the party or parties have used it with some other meaning.[4] The books on Wills, Conveyancing, Mercantile Contracts and the like (to which the reader is referred) contain many examples. Thus, as is explained elsewhere, a mention of a relative, such as a son or nephew, *prima facie* means a legitimate son or nephew and that meaning will be given to such a reference unless the context or admissible evidence establishes that illegitimate relatives of that designation are included. Again, the meaning of "money" in a will was until recently thought to be settled by authority and that, in the absence of context to alter such meaning, it must be applied even if it is almost certain that the testator used the word in some wider sense, and there is certainly a colloquial use of the word "money" in relation to a deceased's estate that means everything that he left. But it is now settled that the ordinary meaning in the

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cf. *Macculloch* v. *Anderson*, [1904] A. C. 55, at p. 60; *Chapman* v. *Perkins*, [1905] A. C. 106, at p. 108; and *Gorringe* v. *Mahlstedt*, [1907] A. C. 225, at p. 226.

[1] *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, at p. 206; cf. *per* Lord WENSLEYDALE in *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, at p. 108; *Perrin* v. *Morgan*, [1943] A. C. 399, at p. 414.

[2] *Vaughan* v. *Headford* (*Marquis*) (1840), 10 Sim. 639, at p. 641.

[3] *Foulger* v. *Arding*, [1902] 1 K. B. 700, at p. 704; and see *per* WARRINGTON, J., in *Pedlar* v. *Road Block Gold Mines of India, Ltd.*, [1905] 2 Ch. 427, at pp. 437, 438.

[4] See *per* Lord ROMER in *Perrin* v. *Morgan*, [1943] A. C. 399, at p. 420; c.f. *Re Pringle*, *Baker* v. *Matheson*, [1946] Ch. 124, at pp. 129, 130.

actual context is to be taken.[1] Apart from these cases previous decisions may be of value in informing the mind of the Court,[2] if it be constantly remembered that they are merely illustrations to afford guidance and not instruments to be applied by simple rule of thumb. They may illustrate a reason or provide an analogy, but cannot be a substitute for argument or principle. In this respect argument in the Chancery Division has changed within living memory. The modern practice is strongly against citation of previous cases merely because the words are similar or even because they are the same unless the context is also the same, and the context very rarely is, unless a standard form has been used.[3]

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[1] *Perrin* v. *Morgan*, [1943] A. C. 399, at pp. 407–412.

[2] See, e.g., *Warrilow* v. *Ward*, [1942] Ch. 257, at p. 262, where FARWELL, J., made use of a decision on another Act; *Re Banca Commerciale Italiana*, [1942] Ch. 406, where SIMONDS, J., used decisions on statutes passed for the purposes of the last war in construing a statute passed for the purposes of the present war; *Colebrook* v. *Watson Investment Co.*, [1944] Ch. 387, where VAISEY, J., did the same; and *Minister of Pensions* v. *Walton* [1946] 1 All E. R. 310, where DENNING, J., used decisions under the Workmen's Compensation Acts to interpret the Personal Injuries (Emergency Provisions) Act, 1939.

[3] See, e.g., Lord GREENE, M.R.'s, observations in *Re Whitby*, [1944] Ch. 210, at pp. 214–15; and in *Somershield* v. *Robins*, [1946] K. B. 244, at p. 250.

CHAPTER IV

CANONS OF CONSTRUCTION

(*a*) NATURE OF CANON OF CONSTRUCTION

THERE are decisions and statutes which are not merely in *pari materia*, but lay down principles which must be observed by all Courts in considering the true meaning of any instrument which is in debate before them.

Rule of Law and Rule of Construction distinguished

A rule of law takes effect whenever the necessary conditions exist, whatever the parties may say. If parties have agreed to certain things which bring about legal consequences, they cannot prevent those consequences following merely by saying that they shall not follow. Thus if two persons constitute themselves partners by entering into an agreement which has that result, they cannot avoid the legal consequences of their agreement by inserting a clause that they are not to be partners.[1]

A rule of construction, on the other hand, points out what a Court should do in the absence of express or implied intention to the contrary.[2] Such a rule is a guide to the intention of the parties as determined by the words used. In using decisions as to the interpretation of documents it must be borne in mind that what is in question is the interpretation of a particular document. Any attempt to enunciate decisions on construction as if they embodied rules of law is to be deprecated.[3] It is also necessary to remember that " the Courts nowadays are not astute to extract rules of construction from earlier decisions, and that is a thing much to be rejoiced at." [4]

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[1] See *Pawsey* v. *Armstrong* (1881), 18 Ch. D. 698, at p. 705; *Sudbury Corporation* v. *Empire Electric Light and Power Co.*, [1905] 2 Ch. 104, at p. 116; and *Fenston* v. *Johnstone* (1940), 23 Tax Cas. 29.

[2] See *per* FRY, L.J., in *Re Coward, Coward* v. *Larkman* (1887), 57 L. T. 285, at p. 291; (on appeal) (1888), 60 L. T. 1; and also *No-Nail Cases Proprietary, Ltd.* v. *No-Nail Boxes, Ltd.*, [1944] K. B. 629, *per cur.*, at p. 638; (affirmed, [1946] 1 All E. R. 523, n. H. L.

[3] See *per* Lord WRIGHT in *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] A. C. 108, at p. 130.

[4] See *per* Lord GREENE, M.R., in *Re Hipwell*, [1945] 2 All E. R. 476, at p. 477.

Rules of Construction vary in Application

There are rules of construction which apply to all written instruments, but there are necessarily also certain rules which apply only, or apply only with modification, to written instruments of a particular class. In all of them the Court assumes that the party or parties are capable of expressing and have expressed their intention fully and clearly in the English language, which necessarily involves in appropriate cases the use of technical words in their proper signification. But it is recognised that this is not necessarily so. Language is often obscure and technical words are often misapplied.

Intention and Expression of Intention

A document consists of words, and each word that is used has at least one meaning, but may have several, and indeed many meanings. A word, also, may have a modified or different meaning when used in combination with other words. A document is not a list of words. It is devised to convey a meaning and therefore the words are arranged into phrases and sentences according to the rules of grammar. Sentences may be grouped into paragraphs and clauses, and the whole is included in one document, presumably because the matters dealt with have some relation to each other. *Prima facie* that document is the only one to be considered, but it may happen that, by incorporation or reference, one or more other documents or parts of documents are to be read with it, or it may happen that the document with others form together one transaction and they are all to be read together. Similar considerations apply when the document has subsequently been altered or supplemented by another document. Interpretation must have regard to all these points.

There are two questions which are usually interlocked, viz., what is the intention which the document sets out to express; and is the document so worded that the Court can say that that intention has been expressed. The Court is usually able to say what the document means, but the task may prove to be impossible either wholly or in part, and in the latter case a third question arises, viz. whether the part can be severed so that it alone fails to have effect, or is it so integral a part of the whole that the whole must fail also. When the meaning has been ascertained, then the Court deals with the last stage of the enquiry, viz., whether the rules of law permit the intention, thus expressed and ascertained, to be carried into effect.

(*b*) ASCERTAINMENT OF WORDS TO BE CONSIDERED

Intention ascertained from Document as a whole

A document must be considered as a whole. It is from the whole of the document coupled with the surrounding circumstances that the general intention of the party or parties is to be ascertained.

" We must not start with any assumption or surmise of probability of intention on the part of the executant. His intention must be gathered from the words of the document." [1] It may and usually does appear from the very form and commencement of the document. A writing commencing " This is the last Will and Testament " and attested as required by the Wills Act, 1837,[2] is obviously meant to be a will and presumably intended to dispose of the maker's estate and effects on his death. A document headed as an Agreement is presumably intended to be such and not *e.g.* a conveyance. If parties use words appropriate to a loan, it will be difficult for them afterwards to establish that it is a contract of sale.[3] Again, it is not legitimate to import into a contract the idea of a trust when the parties have given no indication that such was their intention.[4]

Words not forming Part of Document

As a rule no difficulty is experienced in the determination of the question: what is the document? It must, however, be borne in mind that a document is not synonymous with a piece of paper that has been written on. There is no rule of law that a document shall be written on a separate piece or pieces of paper,[5] or that several documents shall not be written on one piece of paper.[6] It does not follow therefore that all the words appearing on the paper or parchment are necessarily part of the document. Thus, the indorsement on a conveyance is usually the work of a clerk and not intended to be part of the document. Like the short title of a statute it is a label or docket intended to assist identification, but not to affect construction. The same remark applies to marginal notes to a statute. Nevertheless it may, but usually does not, appear that words in an indorsement or a marginal note [7] are really part of the document and therefore must be considered.

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[1] *Per* Lord RUSSELL in *Reid* v. *Coggans*, [1944] A. C., at p. 98; and see *per* Lord MACMILLAN, at p. 102. See also *Re Hipwell*, [1945] 2 All E. R. 476, *per* DU PARCQ, L.J., at p. 479.

[2] 20 Halsbury's Statutes 436.

[3] As in *Ruskin Investments, Ltd.* v. *Copeman*, [1943] 1 All E. R. 378.

[4] *Re Schebsman*, [1944] Ch. 83, *per* Lord GREENE, M.R., at p. 89.

[5] Cf. *R.* v. *Kingston-upon-Hull District Registrar*, [1944] 1 All E. R. 546.

[6] " I cannot see why both notices should not be found on the same piece of paper ": *per* Lord WRIGHT, M.R., in *Wheeler* v. *Wirral Estates, Ltd.*, [1935] 1 K. B. 294, at p. 300. Cf. *Millen* v. *Dent* (1847), 10 Q. B. 846, at pp. 850–1; *Re Underbank Mills Co.* (1885), 31 Ch. D. 226, at p. 231; *Re Ogle's Settled Estates*, [1927] 1 Ch. 229, at p. 233; Stamp Act 1891, s. 3 (2).

[7] For a marginal note on a policy of insurance see *National Farmers' Insurance Society* v. *Dawson*, [1941] 2 K. B. 424, where Lord CALDECOTE, C.J., said, at p. 430, " The marginal note . . . is an unsafe guide to a proper interpretation of this condition." See also *post*, pp. 107, 115.

Parts in relation to whole

In a subsequent chapter an account is given of the parts of certain classes of documents. In matters of interpretation the general rule is that division into parts is a matter of convenience. When this is properly done, the increase of clarity thus obtained materially assists interpretation. When this is not properly done, and the division is not logical or consistent, interpretation is rendered more difficult. Extraneous matters may be introduced and cause additional complication. An example is a case, such as sometimes happens, where a recital states an intention, but the operative part does not mention it. In that case the difficult question arises whether the wording of the recital is such that the Court can hold that it amounts to an operative part and thus give effect to the intention.

The division of a document into parts, especially in the case of conveyances and similar documents for which usage has almost imposed a recognised order and division, is of great use in understanding any document which is more than a very simple one. It is important that a document should be consistent with itself and that each part should be consistent with the whole and with the other parts. The words of each clause should be so interpreted as to bring them into harmony with the general intention shown by the document read as a whole and with the other clauses. But for the purpose the context must be at least as plain as the words.[1]

Conveyancing is almost an exact science and the division into parts and their order *inter se* is settled by long usage, but want of skill or neglect of forms will not of itself operate to defeat an intention which is otherwise clear. Thus a recital, which should contain only introductory statements, has been held to take effect as a covenant [2] or as the execution of a power [3] or as a declaration to bar dower.[4] But where a recital stated an intention to settle property on the same trusts as contained in a will but the operative part was not so expressed as to carry out such an intention, it was held impossible to supply words so as to make the operative part carry out the intention stated in the recitals, for where the operative part is clear it cannot be controlled by the recital.[5] As a rule, however, the part in which words are found indicates sufficiently the force they are intended to have, and, in cases where the meaning is in doubt, may determine the difficulty.

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[1] See *per* JESSEL, M.R., in *Bentley* v. *Rotherham & Kimberworth Local Board* (1876), 4 Ch. D. 588, at p. 592.

[2] *Hollis* v. *Carr* (1676), Freem. Ch. 3; *Buckland* v. *Buckland*, [1900] 2 Ch. 534; but see *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, at p. 539.

[3] *Poulson* v. *Wellington* (1729), 2 P. Wms. 533; see also *Re Sugden's Trusts, Sugden* v. *Walker*, [1917] 2 Ch. 92.

[4] *Re Gibbon, Moore* v. *Gibbon*, [1909] 1 Ch. 367, at p. 380.

[5] *Inland Revenue Commissioners* v. *Raphael*, [1935] A. C. 96.

Form, therefore, although of great use in interpretation, is not the dominant consideration: whenever necessary it must give way to substance.

Reading Documents together

Where a transaction is carried out by means of several documents so that together they form part of a single whole, these documents are read together as one.[1] The same principle applies when a document is amended by supplemental agreement or deed or a testator makes one or more codicils to his will. Where contemporary documents can be read in more ways than one, and in one of them they are consistent and in the other or others inconsistent, that construction is to be preferred which will render them consistent. If one of two such documents is ambiguous in its terms and the other is clear, force is to be given to the latter so as to interpret the ambiguous document.[2] This applies when the documents are to be read together: it does not mean that one of two independent documents may be used to assist in construing the other.[3] Difficult questions often arise whether a number of papers together constitute one instrument or several separate and distinct instruments. In the former case they take effect together and are read as one, and in the latter case they are not so regarded and may therefore fail to take effect.[4]

Incorporation of Documents

The contents or part of the contents of another document may be incorporated by reference,[5] and in such cases the other document, so far as it is incorporated, is read with the document under consideration. Where the incorporation is by general words, as in

[1] Contrast *Tooke* v. *Bennett & Co., Ltd.*, [1940] 1 K. B. 150; and *Central Advance & Discount Corporation, Ltd.* v. *Marshall*, [1939] 2 K. B. 781, both decisions on the Moneylenders Act, 1927, s. 6.

[2] *Re Phoenix Bessemer Steel Co.* (1875), 44 L. J. Ch. 683; *Mills Conduit Investments, Ltd.* v. *Tattersall*, [1940] 1 All E. R. 281, where the memorandum of a moneylending transaction was ambiguous, but the meaning was accepted that was consistent with the promissory note which constituted the loan contract.

[3] "A document which is not incorporated and is not part of the surrounding circumstances cannot be used to construe the document in issue. I think it is a sound criticism that you cannot construe one document by reference to another": *per* Lord GREENE, M.R., in *Picken* v. *Balfour of Burleigh* (*Lord*), [1945] Ch. 90; and as to statutes, see *per* Lord GREENE, M.R., in *Somershield* v. *Robin*, [1946] K. B. 244 at p. 251.

[4] Contrast, as to wills, *In the Goods of Horsford* (1874), L. R. 3 P. & D. 211, and *In the Goods of Hatton* (1881), 6 P. D. 204, and for an extreme case of execution on an envelope containing the will see *In the Goods of Mann*, [1942] P. 146, which may be contrasted with *In the Estate of Bean*, [1944] P. 83.

[5] For a case where a policy for one purpose incorporated provisions contained in it in relation to another purpose, see *Richards* v. *Cox*, [1943] 1 K. B. 139.

the case of bills of lading which often incorporate terms of the charterparty, the reference is strictly construed.[1] Thus such an expression as "freight as per charterparty" will not incorporate any terms of the other instrument which are outside the terms and scope of the document which contains the reference,[2] and consequently the stipulation mentioned does not incorporate a lien for freight contained in the charterparty[3] or the provisions as to demurrage.[4] It follows that where a charterparty is so incorporated by reference, provisions in it which are inapplicable to a bill of lading are disregarded,[5] unless indeed the terms of reference necessarily involve the incorporation of such provisions.[6] It is immaterial whether the document so incorporated is void or voidable; thus where a ship owner was entitled to repudiate the charterparty, the valid bill of lading referring to it incorporated such terms as were thereby adopted.[7] Terms in the document incorporated which are inconsistent with the express terms of the incorporating document are not incorporated by reference.[8] Thus a provision in a charterparty for a lump sum freight was not so incorporated in a bill of lading providing for freight on a tonnage basis.[9] A deed of arrangement providing (*inter alia*) that the trustee should distribute the assets "in the like manner and with the like priorities and in all respects as in bankruptcy" imports into the deed the provisions of the Bankruptcy Acts for that purpose only and does not import them into the other provisions of the deed.[10]

A document may be incorporated in a will if it is referred to as an *existing* document and in such terms that it can be identified,[11] but a testator cannot by such means obtain power to make *future* unattested testamentary dispositions.[12] It follows that a gift upon the trusts of an identified existing document or any substitution, modification or addition to or of it, is invalid, as the gift is not on the terms of the

[1] *The Modena, Chiesman & Co.* v. *Modena (Owners)* (1911), 16 Com. Cas. 292.

[2] *Diederichsen* v. *Farquharson* [1898] 1 Q. B. 150, at p. 159.

[3] *Fry* v. *Chartered Mercantile Bank of India* (1866), L. R. 1 C. P. 689.

[4] *Chappel* v. *Comfort* (1861), 10 C. B. (N. S.) 802; and see *Hogarth Shipping Co., Ltd.* v. *Blyth, Greene, Jourdain & Co., Ltd.*, [1917] 2 K. B. 534.

[5] *Porteus* v. *Watney* (1878), 3 Q. B. D. 534, at p. 541.

[6] *The Northumbria*, [1906] P. 292.

[7] *Aktieselskabet Ocean* v. *Harding*, [1928] 2 K. B. 371.

[8] *Gardner* v. *Trechmann* (1884), 15 Q. B. D. 154, at p. 157; cf. *Inland Revenue Commissioners* v. *Raphael*, [1935] A. C. 96.

[9] *Red "R" S.S. Co.* v. *Allatini Bros.* (1909), 14 Com. Cas. 82.

[10] *Cole* v. *Lynn*, [1942] 1 K. B. 142.

[11] *Smart* v. *Prujean* (1801), 6 Ves. 560, at p. 565; *Allen* v. *Maddock* (1858), 11 Moo. P. C. C. 427, at p. 454; *In the Goods of Smart*, [1902] P. 238, at p. 240; *Re White, Knight* v. *Briggs*, [1925] Ch. 179; *In the Estate of Mardon*, [1944] P. 109, at p. 112.

[12] *Singleton* v. *Tomlinson* (1878), 3 App. Cas. 404; *University College of N. Wales* v. *Taylor*, [1908] P. 140; *Re Keen, Evershed* v. *Griffiths*, [1937] Ch. 236.

document but on alternatives of which the document is only one and of which the others would give testamentary validity to a future unattested disposition or dispositions. The document by itself does not fully express the testator's intention, though it would do so if the gift were expressed to be upon the trusts of the document unless the testator subsequently modified it.[1] Where the reference is to entries in an existing book, which contains entries made both before and after the execution of the will, only the earlier entries will be regarded.[2]

The memorandum and articles of association of a registered company are *in pari materia* and either can be referred to if it throws light on the construction of the other, but they fulfil different functions and the articles can never override the memorandum.[3]

With regard to statutes, it is necessary to distinguish between (*a*) the reading together of statutes *in pari materia*, and (*b*) incorporation by reference.

(*a*) Where two or more statutes are *in pari materia*, though made at different times and not in terms referring to one another, they are taken to be parts of one system and construed together,[4] unless it is clear that in some material respect the latter has altered the former Act.[5] Thus the Private Street Works Act, 1892,[6] is *in pari materia* with the Public Health Act, 1875,[7] and accordingly it was held that the cost of lowering public sewers under a private road which was being made up under the 1892 Act could not be charged on the frontagers but must be borne by the ratepayers generally.[8] Where a later Act provided that nothing in it was to include debentures, it was held that debentures were also excluded from the earlier Act.[9] "In construing the latest of a series of Acts dealing with a specific subject matter, particularly when all such Acts are to be read as one, great weight should be attached to any scheme that can be seen in clear outline, and amendments to later Acts should, if possible, be construed consistently with that scheme. But this is a principle that can easily be pressed too far." [10]

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[1] *Re Jones' Will Trusts*, [1942] Ch. 328.

[2] *Re Coyte* (1887), 56 L. T. 510.

[3] *Ashbury* v. *Watson* (1885), 30 Ch. D. 376; but see *Re Phoenix Bessemer Steel Co.* (1875), 44 L. J. (Ch.) 683.

[4] *R.* v. *Loxdale* (1758), 1 Burr. 445; *Goldsmiths' Co.* v. *Wyatt*, [1907] 1 K. B. 95; but see *R.* v. *Titterton*, [1895] 2 Q. B. 61.

[5] *Canada Southern Rail. Co.* v. *International Bridge Co.* (1883), 8 App. Cas. 723, at p. 727; *Hart* v. *Hudson*, [1928] 2 K. B. 629; *Phillips* v. *Parnaby*, [1934] 2 K. B. 299; *Pratt* v. *Cook, Son & Co., Ltd.*, [1939] 1 K. B. 364, at p. 386.

[6] 9 Halsbury's Statutes 193.

[7] 13 Halsbury's Statutes 623.

[8] *Re Jesty's Avenue, Broadway, Weymouth*, [1940] 2 K. B. 65.

[9] *Read* v. *Joannon* (1890), 25 Q. B. D. 300; and see *Ormond Investment Co.* v. *Betts*, [1928] A. C. 143.

[10] *Per* Lord SIMONDS in *Fendoch Investment Trust Co.* v. *Commissioners of Inland Revenue*, [1945] 2 All E. R. 140, at p. 144.

It has been pointed out that where a statute is divided into parts, one part throws no more light on the others than if they were in separate Acts.[1] Indeed, "though it is true that in construing a statute the principle applies that the different provisions must be read together, that is true only so far as the provisions are in substance coherent and the one set are plainly necessary to supplement or qualify the other."[2] It has been held that a repealed statute *in pari materia* with an existing statute may properly be referred to for the purpose of construing the latter.[3] An ambiguity can be conclusively resolved by referring to subsequent legislation that removes the doubt.[4] But it must not be assumed as a matter of statutory construction that earlier provisions have a particular meaning because, if so interpreted, the need for the later enactment is elucidated.[5] The fact that a statute expressly provides that it is to be read with another or others which are *in pari materia* to it adds nothing. It merely states expressly what would be implied if nothing were stated. This is not the same thing as a reference to another statute as providing some light on the problem before the Court.[6]

(*b*) Incorporation is usually by reference and may or may not refer to a statute *in pari materia*. The provision may incorporate a section or sub-section or more or all of a previous Act. A section so incorporated bears the same meaning as in the Act in which it originally appeared.[7] If the original Act is repealed, the incorporated section or sections still operate in the later Act.[8] Where a repealing Act re-enacts some portion of the repealed Act, that portion has *prima facie* a retrospective operation,[9] but such a provision in the repealing Act does not repeal an intermediate statute which is inconsistent with the re-enacted portion.[10]

The modern system of legislation by reference has great advantages in relation to the progress of a Bill through Parliament but has few advantages when once it has become an Act, especially when as often happens the sections are incorporated or definitions adopted,

[1] *Cope* v. *Doherty* (1858), 4 K. & J. 367.

[2] *Per* Lord WRIGHT in *McMahon* v. *David Lawson, Ltd.*, [1944] A. C. 32, at p. 47.

[3] *Re Copeland, Ex parte Copeland* (1852), 2 De G. M. & G. 914.

[4] *Gibson* v. *Mitchell*, [1942] 2 K. B. 217, at p. 227.

[5] *Per* SIMON, L.C., in *Thomas Fattorini* (*Lancashire*) v. *Inland Revenue Commissioners*, [1942] A. C. 643, at p. 652.

[6] As UTHWATT, J., did in *Re Orbit Trust, Ltd.'s Lease*, [1943] Ch. 144, at p. 151; where in connection with the Landlord and Tenant (War Damage) Act, 1939, he referred to 18 & 19 Car. 2, c. 7, on the Great Fire.

[7] *Portsmouth Corporation* v. *Smith* (1885), 10 App. Cas. 364, at p. 371.

[8] *R.* v. *Merionethshire Inhabitants* (1844), 6 Q. B. 343; *Jenkins* v. *Great Central Rail. Co.*, [1912] 1 K. B. 1, at p. 8; but see *R.* v. *Stepney Union* (1874), L. R. 9 Q. B. 383, at pp. 392, 396.

[9] *Baddeley* v. *Denton* (1849), 1 L. M. & P. 172; *Re Ashcroft, Ex parte Todd* (1887), 19 Q. B. D. 186, at p. 195.

[10] *Morisse* v. *Royal British Bank* (1856), 1 C. B. (N. S.) 67.

often with modifications, only so far as they are not inconsistent with the Act which refers to them. The task of ascertaining the meaning of such legislation is always difficult and sometimes verges on the impossible.[1] This criticism does not apply to the practice of passing general statutes containing common clauses, such as the 1845 statutes, intended to come into operation when and so far as they are incorporated in a special statute. In such a case the incorporated provisions of the Clauses Act are read with the provisions of the special Act as though they were set out in full in the special Act.[2] Where a statute is not incorporated or *in pari materia* it is not as a rule permissible to use it in order to construe another statute.[3]

Punctuation

Punctuation and other marks of emphasis are not part of the English language, and there is a wide divergence of practice even in the works of standard authors. They are meant to assist the eye and thereby the understanding of the written or printed matter. A good draftsman is able to express the intention without their aid. Nevertheless when such marks appear the Court does not ignore their existence or significance, and indeed in reading the words of an unpunctuated document will read them with such stops as will give due effect to the words,[4] but such marks as exist must always give way to the sense of the writing or printing.

Statutes used to be engrossed on the Parliament Roll without punctuation. Engrossment was discontinued in 1849 and a system of printing a King's Printer's copy on vellum, which is preserved at the House of Lords, was substituted.[5] Therefore, as there had been for many years a practice of putting punctuation marks in King's Printer's copies, the record does show punctuation. But those marks are not part of the statute.[6] It was said by GRANT, M.R., in *Sanford* v. *Raikes*,[7] that marks of punctuation in statutes are not regarded, and this was approved by Lord WESTBURY, C., in *Gordon* v. *Gordon*,[8] but was disapproved by Lord FINLAY, C., in *Houston* v. *Burns*.[9]

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[1] See *Knill* v. *Towse* (1889), 24 Q. B. D. 186, at pp. 195, 196; *Tracey* v. *Pretty*, [1901] 1 K. B. 444, at p. 451.

[2] *Re Barker* (1881), 17 Ch. D. 241; *London & N. Western Rail. Co.* v. *Runcorn Rural Council*, [1898] 1 Ch. 561, at p. 563; *Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425, at p. 430.

[3] *Somershield* v. *Robin*, [1946] K. B. 244, *per* Lord GREENE, M.R., at p. 251.

[4] See *per* KENYON, L.C.J., in *Doe* d. *Willis* v. *Martin* (1790), 4 Term. Rep. 39, at pp. 65, 66.

[5] May's Parliamentary Practice (14th Ed.), p. 563.

[6] *Claydon* v. *Green* (1868), L. R. 3 C. P. 511, at pp. 519, 522; *A.-G.* v. *Great Eastern Rail. Co.* (1879), 11 Ch. D. 449, at p. 465; *Devonshire* (*Duke*) v. *O'Connor* (1890), 24 Q. B. D. 468, at p. 478; *Sutton* v. *Sutton* (1882), 22 Ch. D. 511; cf. *R.* v. *Casement*, [1917] 1 K. B. 98.

[7] (1816), 1 Mer. 651. [8] (1871), L. R. 5 H. L. 254, at p. 276.

[9] [1918] A. C. 337, at pp. 342, 348.

In the case of deeds, the Courts have, by supplying parentheses or other marks of punctuation, annexed words of limitation not only to the grant immediately preceding those words but also to all previous grants in the same document.[1] In the case of wills, the Courts have relied on parentheses [2] and commas,[3] on the fact that a new sentence was begun [4] and on the fact that the material words were written as one sentence and closed by a full stop.[5] It has been said that regard may be had to the punctuation,[6] and also that parentheses are not to be rejected even when by the rules of grammar the sentence is complete without them and they do not diminish the effect of the words appearing within them.[7] Full stops were rejected in a case where " £1.0.0 " was read as £100.[8]

The present position therefore appears to be that the Court will use the punctuation marks that appear in a document, and, if necessary, supply them. If they are meaningless or conflict with the plain meaning of the words, they will not be allowed to cause a meaning to be placed on those words that they do not bear.

Translation

As already stated, whenever a foreign document is put in evidence, a translation must be produced and proved. If a document is in shorthand or code or cypher a transcript must be available and proved.

Abbreviations

" Abbreviated references in a commercial document are, in spite of priority, often self explanatory or susceptible of definite application in the light of the circumstances, as, for example, when the reference is to a term, clause or document of a well-known import, like c.i.f., or which prevails in common use in a particular place of performance, as may be indicated by the addition of the epithet 'usual.' [9] But in the case before us the phrase in controversy gave

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[1] *Doe* d. *Willis* v. *Martin* (1790), 4 Term. Rep. 39; *Owen* v. *Smyth* (1796), 2 Hy. Bl. 594; *Galley* v. *Barrington* (1825), 2 Bing. 387; cf. *Tunstall* v. *Trappes* (1829), 3 Sim. 286; and *Re Stanley's Settlement, Maddocks* v. *Andrews*, [1916] 2 Ch. 50.

[2] *Morrall* v. *Sutton* (1845), 1 Ph. 533, at p. 538.

[3] *Gauntlett* v. *Carter* (1853), 17 Beav. 586, at p. 591.

[4] *Compton* v. *Bloxham* [1845), 2 Coll. 201.

[5] *Child* v. *Elsworth* (1852), 2 De G. M. & G. 679, at p. 683.

[6] *Oppenheim* v. *Henry* (1853), 10 Hare, 441; see *Re Battie-Wrightson, Cecil* v. *Battie-Wrightson*, [1920] 2 Ch. 330, at p. 335; and *Re Jackson, Day* v. *Atkin*, [1946] 1 All E. R. 327, at p. 328.

[7] *Gascoigne* v. *Barker* (1743), 3 Atk. 8; cf. *Thellusson* v. *Woodford* (1799), 4 Ves. 227; (on appeal) (1805), 11 Ves. 112.

[8] *Manchee* v. *Kay* (1862), 3 Giff. 545.

[9] See, e.g., *Shamrock S.S. Co.* v. *Storey* (1899), 5 Com. Cas. 21, where " usual colliery guarantee " was used in a charter-party in order to define loading obligations.

no clue of any sort to indicate what particular war contingencies affecting performance were intended to apply." [1] It follows that if abbreviations are used the Court will construe the document in the light of the full expression so abbreviated, but not so as to supply provisions which are not thereby sufficiently stated.

Alterations

An alteration in the document itself must be distinguished from a variation made later. Any instrument in writing may validly be altered before execution.[2] Alterations in a document *inter vivos* are presumed to have been made before execution,[3] but after execution in the case of unattested alterations in a will.[4] In the former case therefore the onus of proof is on the person asserting that the alteration was made after execution; in the latter case on the person who asserts that it was made before execution. An alteration in a will may be authenticated by its being initialled by the testator and the witnesses,[5] but not by the witnesses alone [6] or the will may be re-executed or confirmed by a subsequent codicil.[7] "The mere circumstance of the amount or the name of a legatee inserted in a different handwriting and in a different will would not alone constitute an 'abbreviation, interlineation or other alteration.' Blanks may be supplied in a different ink because the will may probably be brought with blanks to the testator and then filled up. No presumption could arise in such a case against the will. But the case is different when there is an erasure on the face of the will and when that erasure has been superinduced by other writing." [8] Alterations on a deed or will which appear merely to have been put there for consideration are disregarded, and it has been considered that pencillings are *prima facie* merely deliberative. Alterations in a will which have not been authenticated or proved to have been made before execution are disregarded.

Where in an indictment words were underlined and the place where they should be read was indicated by a caret, the Court overruled an objection based on the contention that the Court would take no notice of a caret.[9] The alteration was obviously made before the bill went to the Grand Jury.

An immaterial alteration in a deed or other instrument *inter*

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[1] *Bishop and Baxter, Ltd.* v. *Anglo-Eastern Trading, etc. Co., Ltd.*, [1944] K. B. 12, *per cur.*, at p. 16.

[2] *Jones* v. *Jones* (1833), 1 Cr. & M. 721.

[3] *Doe* d. *Tatum* v. *Catomore* (1851), 16 Q. B. 745.

[4] *Cooper* v. *Bockett* (1846), 4 Moo. P. C. C. 419; *Oldroyd* v. *Harvey*, [1907] P. 326.

[5] *In the Goods of Blewitt* (1880), 5 P. D. 116.

[6] *In the Goods of Shearn* (1880), 50 L. J. (P.) 15.

[7] *In the Goods of Hall* (1871), L. R. 2 P. & D. 256.

[8] *Greville* v. *Tylee* (1851), 7 Moo. P. C. C. 320, at pp. 327–8 (P. C.).

[9] *R.* v. *Davis* (1836), 7 C. & P. 319.

vivos made after execution, such as putting in the date,[1] does not invalidate it.[2] An alteration is material if it affects the nature or effect of the instrument. Where such an instrument is executory a material alteration by a party or by a stranger invalidates it, but the party who makes the alteration, or has the custody of the instrument when a stranger alters it, cannot escape liability to the other party in that way.[3] Alteration does not have a retrospective operation so as to invalidate a conveyance or other legal consequence that had taken effect before the alteration,[4] and an instrument which has been invalidated in that way can therefore be given in evidence to prove a right or title created by it, and also to prove a collateral fact.[5] An alteration made with the consent of all parties in order to effectuate the intention of the deed is valid, but not when the alteration is made to effectuate some other intention,[6] though in the latter case it may take effect as a new deed.[7] A deed, unlike a written instrument, cannot validly be executed with the name of a party in blank. Whatever effect it may have, it is not valid as a deed,[8] though it may operate as an agreement.[9] A deed of transfer executed with the transferee's name left blank, even if filled up later, is not a deed at law [10] or in equity [11]; and the same rule applies to debentures.[12] Alterations are not made in this way to statutes or to rules made under statutory authority. If a mistake has been made, the matter is put right by legislation or reissue.

Blanks

It sometimes happens that by inadvertence a document is executed with a blank or blanks in it. Where the omitted matter is not material, then, as already explained, the filling up of the blank is an immaterial alteration, such as the date, and if a deed is delivered

[1] Whether the date is material or not depends on the nature of the document. Thus the date of a notice of assignment under s. 136 of the Law of Property Act, 1925, is the date of its receipt, and consequently the date that it bears is not material; see *Holt* v. *Heatherfield Trust, Ltd.*, [1942] 2 K. B. 1, at p. 6.

[2] *Crediton (Bishop)* v. *Exeter (Bishop)*, [1905] 2 Ch. 455; *Keane* v. *Smallbone* (1855), 17 C. B. 179.

[3] *Pigot's Case* (1614), 11 Co. Rep. 26b.

[4] *Nelthorpe* v. *Dorrington* (1674), 2 Lev. 113; *Bolton* v. *Carlisle (Bishop)* (1793), 2 Hy. Bl. 259, at p. 263; *Davidson* v. *Cooper* (1843), 11 M. & W. 778, at p. 800; (on appeal) 13 M. & W. 343; *R.* v. *Paulson*, [1921] 1 A. C. 271.

[5] *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851), 16 Q. B. 432, at p. 440.

[6] *French* v. *Patton* (1808), 9 East, 351.

[7] *Hill* v. *Patten* (1807), 8 East, 373.

[8] *Re Barned's Banking Co.* (1867), 3 Ch. App. 105.

[9] *Re Tahiti Cotton Co., Ex parte Sargent* (1874), L. R. 17 Eq. 273.

[10] *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200.

[11] *Tayler* v. *Great Indian Peninsula Rail. Co.* (1859), 4 De G. & J. 559.

[12] *Re Queensland Land and Coal Co., Davis* v. *Martin*, [1894] 3 Ch. 181.

as an escrow until material blanks have been filled in, then the insertion of the omitted matter will not affect its validity, as a deed only operates when it has been delivered.[1]

When, however, the deed or other instrument is executed and comes into operation with a blank or blanks in it, the question then arises how the omitted matter can be supplied. The rule is that it can only be supplied by construction and not by extrinsic evidence.[2] Thus it is comparatively easy as a rule to supply from the context the denomination where a figure only has been given and a sum of money was clearly meant.[3] Again, where a man left his property to his wife for life and then to her niece and went on to say "I give the use of £500 stock for her natural life but after her decease I give the £500 among my wife's brothers and sisters," evidence was not admitted in order to show who was meant by "her," but by construction the Court was able to say that it was the wife and not the niece.[4] It would seem, however, that evidence is admissible when a surname is given but the Christian name left blank, *e.g.* "to —— D., the daughter of S. D." S. D. had three daughters, and evidence was admitted to show that Mary was the one meant.[5] Where a sentence or clause is omitted, then it is almost impossible to supply the omitted matter by construction, even if a skilled draftsman can be quite sure what he would have inserted. Sometimes a blank can be treated as *falsa demonstratio* and therefore ignored. In one case, where the testatrix had left a blank in a printed form, the Court, after inspecting the original, read the printed words consecutively, it being a common form and the testatrix having obviously no wish to fill up the blank.[6]

Where a testator made his will on a printed form and after appointing C. his executor and providing for payment of his debts and funeral and testamentary expenses continued "I give and bequeath to C." it was held that notwithstanding the blank the will sufficiently expressed the testator's intention to give his whole estate to C.[7]

Mistakes

The Court does not assume that a mistake has been made and consequently if the words as they stand can have effect they will be construed accordingly, unless it appears clearly from the other parts of the document that any slip has occurred. In that case

[1] *Hudson* v. *Revett* (1829), 5 Bing. 368; *Adsetts* v. *Hives* (1863), 33 Beav. 52; *Rudd* v. *Bowles*, [1912] 2 Ch. 60.

[2] *Castledon* v. *Turner* (1745), 3 Atk. 257; *Hunt* v. *Hort* (1791), 3 Bro. C. C. 311.

[3] *Coles* v. *Hulme* (1828), 8 B. & C. 568; *Mourmand* v. *Le Clair*, [1903] 2 K. B. 216.

[4] *Castledon* v. *Turner* (1745), 3 Atk. 257.

[5] *Phillips* v. *Barker* (1853), 1 Sm. & G. 583; *Price* v. *Page* (1799), 4 Ves. 680.

[6] *Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390, at p. 395.

[7] *Re Messenger's Estate, Chaplin* v. *Ruane*, [1937] 1 All E. R. 355.

the Court will correct the slip, but will not go further [1]; its powers do not extend to making such alterations as are necessary to bring the document in accord with the judge's idea of what is right or reasonable.[2] The intention which is being given effect to must be ascertained in accordance with established principles. When that has been done, the Court will be able to decide which of the two or more possible readings is the right one, but if the words are clear and bear a single definite meaning, that meaning must be given effect to, however unreasonable or absurd it may seem to be.[3] As a rule a man is entitled to be unreasonable or capricious, and it is his document that is being construed, not reshaped. It is for that reason that only obvious slips will be corrected. Thus where a father who had a power of appointment exercised the power and subsequently made a further exercise by a deed which recited the former appointment and in the operative part appointed another fund to the same appointee upon the same trusts " as hereinbefore declared " of the fund " hereinbefore appointed," the Court read these words as " hereinbefore *recited to have been* declared " and " appointed " respectively, as it was obvious that the inclusion of the word " hereinbefore " by itself was a mere slip.[4] On the other hand, the Court has found itself unable to supply the word " simple " after the word " fee " in a re-conveyance, although the tenor of the deed strongly suggested that " fee simple " was meant.[5] The deed however could fully operate as drawn.

Notices and similar instruments are not consensual documents and must, on a fair and reasonable construction, do what they are intended to do. In construing such a document, the Court in case of ambiguity will lean in favour of reading it in such a way as to give it validity, but where it is clear and specific in such a matter as a date it is impossible to substitute a different date because it would appear that a slip had been made.[6]

When the mistake is not in course of the setting down of the words, but is the reason why the words have been adopted, then the Court cannot correct such a mistake, apart from rectification, *e.g.*, where a notice is clear and specific, but contains a date which renders the notice nugatory, the Court will not construe it as if the appropriate date were in fact inserted and thereby validate an invalid notice.[7]

[1] *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, at p. 634; *Price* v. *Mann*, [1942] 1 All E. R. 453.

[2] *Abel* v. *Lee* (1871), L. R. 6 C. P. 365, at p. 371.

[3] *R.* v. *City of London Court Judge*, [1892] 1 Q. B. 273, at p. 290; *Taylor* v. *Oldham Corporation* (1876), 4 Ch. D. 395, at p. 405; *London & India Docks Co.* v. *Thames Steam Tug and Lighterage Co.*, [1909] A. C. 15, at p. 23.

[4] *Hanbury* v. *Tyrell* (1856), 21 Beav. 322.

[5] *Re Ethel and Mitchells and Butlers' Contract*, [1901] 1 Ch. 945.

[6] See *per* GREENE, M.R., in *Hankey* v. *Clavering*, [1942] 2 K. B. 326, pp. 329–330.

[7] *Hankey* v. *Clavering*, [1942] 2 K. B. 326, at p. 330; but see *Price* v. *Mann*, [1942] 1 All E. R. 453.

For the purpose of correcting slips, words can be omitted or supplied or transposed.[1] Mere misspelling is ignored.[2]

With regard to wills, it is necessary to remember that the Probate Division decides what is to be admitted to probate as being the words of a will but the Chancery Division is the court of construction. Although both as Divisions of the High Court have full jurisdiction, they take care not to enter on one another's provinces. A Court of Probate will not decide questions of construction unless necessary for the purpose of granting probate,[3] *e.g.* where an applicant claims as executor according to the tenor, and the Chancery Division is correspondingly careful lest by adding or taking away words, it *pro tanto* usurps or indeed overrides the probate jurisdiction. This rule as to probate used to apply to cases where the estate passes to the personal representatives on death, which was always the case as to personalty, and applies to the whole estate where death occurs after December 31, 1925.[4]

The court of construction therefore never alters or adds to a will without necessity,[5] and then only by construction not by evidence. There must be palpably an error of the engrosser.[6] Thus where a testator named a daughter and then four out of his five other children and directed that the five others should have their portions made up to the portion given to the first-named daughter, it was obvious that by accident one child had not been named and the direction was held to apply to all other children and not merely the four named.[7] Necessary words will be added where the intention is clear and their omission would cause an intestacy.[8] But where there were provisions which omitted to deal with a contingency that happened, viz. that the beneficiary should marry and have no children, the Court was not able to supply the omission,[9] and is certainly never able to do so when the omission may have been intentional.[10]

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[1] *Abbot of Oseney's Case* (1336), Y. B. 10 Edw. 3, Mich. 43, pl. 2; *Uvedale* v. *Halfpenny* (1723), 2 P. Wms. 151; *Hamilton* v. *Farrer* (1831), 8 Bing. 10 (where a recovery was amended by transposing the names of demandant and tenant).

[2] *R.* v. *Edgar* (1737), 1 Sess. Cas. (K. B.) 29.

[3] *Bernal* v. *Bernal* (1838), 3 My. & Cr. 563n; *Barnaby* v. *Tassell* (1871), L. R. 11 Eq. 363, at p. 368; *In the Estate of Fawcett*, [1941] P. 85; cf. *Hewson* v. *Shelley*, [1914] 2 Ch. 13.

[4] Administration of Estates Act, 1925, s. 2 (1); 8 Halsbury's Statutes 307.

[5] *Penny* v. *Turner* (1848), 2 Ph. 493.

[6] *Molesworth* v. *Molesworth* (1784), 1 Cox Eq. Cas. 75; *Phillips* v. *Rail* (1906), 54 W. R. 517.

[7] *Gould* v. *Gould* (1831), 1 L. J. (Ch.) 60; and see *Spence* v. *Handford* (1858), 27 L. J. (Ch.) 767; and *Re Alcock, Bonser* v. *Alcock*, [1945] Ch. 264, at p. 267.

[8] *Hope* v. *Potter* (1857), 3 K. & J. 206.

[9] *Re Hocking, Mitchell* v. *Loe*, [1898] 2 Ch. 567.

[10] *Peacock* v. *Stockford* (1853), 3 De G. M. & G. 73; *Holder* v. *Howell* (1803), 8 Ves. 97; *Re McEacharn, Gambles* v. *McEacharn* (1911), 103 L. T. 900.

Thus words will be transposed, if necessary, but when a possible, though improbable, meaning can be given the Court will not transpose.[1] It has been said that where the clauses of a will lie shuffled together in a confused heap the Court can rearrange them if rearrangement will convey an intelligible meaning consonant with the general intention awkwardly expressed by the testator.[2] Words, etc., are transposed to make sense of what is otherwise insensible, not where they are sensible as they stand, still less to let in other beneficiaries.[3] Words that are redundant and superfluous will be disregarded.[4] They will also be rejected if it is impossible to construe the will with them and it can be construed without them,[5] but not where it is merely improbable that the testator can have meant what he has said. They will be rejected, too, where they are simply meaningless.[6] One word may be substituted for another when it is manifest not only that the one word which was used was not intended but also that the other word was necessarily intended.[7] Thus, where the will made provision in the event of the daughter not marrying nor having any children, and the daughter married and had no child and became a widow, it was held that the word "nor" should be read as "or not," so that the gift over took effect.[8] Unless that is the case the Court will not interfere.[9]

In the case of statutes, the Court presumes that Parliament does not make mistakes,[10] and will apply this principle strictly, for it is the province of Parliament, not of the Court, to put right mistakes in legislation. The Court will, however, correct faults of language where the intention is clear, but cannot supply words to remedy what appears to be an omitted case or to remove something that has been enacted.[11] The Court is not bound by recitals or preambles which contain an inaccurate statement of the law.[12] It would be different if the mistaken statement is made in such a way as to

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[1] *Key* v. *Key* (1855), 1 Jur. (N. S.) 372; *Marlborough* (*Duke*) v. *Godolphin* (*Lord*) (1750), 2 Ves. Sen. 61; *Parkhurst* v. *Smith* (1742), Willes 327, at p. 332.

[2] *Hudson* v. *Bryant* (1845), 1 Coll. 681.

[3] *Chambers* v. *Brailsford* (1816), 2 Mer. 25.

[4] *Minshull* v. *Minshull* (1737), 1 Atk. 411.

[5] *Chambers* v. *Brailsford, supra.*

[6] *Lunn* v. *Osborne* (1834), 7 Sim. 56.

[7] *Dent* v. *Pepys* (1822), 6 Madd. 350; *White* v. *Vitty* (1828), 4 Russ. 584.

[8] *Mackenzie* v. *King* (1848), 17 L. J. (Ch.) 448. This, however, is probably also to be justified on the ground that bad grammar does not invalidate a provision.

[9] *Blundell* v. *Chapman* (1864), 33 Beav. 648.

[10] *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A. C. 531.

[11] *Bristol Guardians* v. *Bristol Waterworks Co.*, [1914] A. C. 379, at p. 388; *Logan* v. *Burslem* (1842), 4 Moo. P. C. 284, at p. 297.

[12] *Port of London Authority* v. *Canvey Island Commissioners*, [1932] 1 Ch. 492.

amount to an enactment that it shall be taken to be the law.[1] Nor are erroneous statements of fact in a statute binding on the Court. A statement of fact in a statute is evidence of that fact but is not conclusive evidence.[2]

Nevertheless, when it is necessary for the purposes of construction, the Court may :—

(*a*) correct obvious misprints [3] ;

(*b*) reject words as superfluous [4] or meaningless [5] ; but only when absolutely necessary,[6] and not merely because the expressions are obscure and the construction is difficult [7] ;

(*c*) supply omitted words [8] ;

(*d*) substitute one word for another [9] (*sed quaere*) ;

(*e*) transpose words [10] ;

(*f*) treat an affirmative word as negative and *vice versa* [11] ;

(*g*) treat a disjunctive word as conjunctive [12] and *vice versa* [13] ; or

(*h*) extend the literal meaning of words.[14]

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[1] *R.* v. *Oldham Corporation* (1868), L. R. 3 Q. B. 474. This result might follow if the later statute were *in pari materia* with the earlier one (*Ormond Investment Co.* v. *Betts*, [1928] A. C. 143).

[2] *R.* v. *Haughton* (*Inhabitants*) (1853), 1 E. & B. 501, at p. 516 ; and see *Cowell* v. *Chambers* (1856), 21 Beav. 619.

[3] *R.* v. *Wilcock* (1845), 7 Q. B. 317.

[4] *R.* v. *Everdon* (*Inhabitants*) (1807), 9 East, 101 ; *R.* v. *Vasey*, [1905] 2 K. B. 748.

[5] *Hough* v. *Windus* (1884), 12 Q. B. D. 224, at p. 229 ; *R.* v. *Ettridge*, [1909] 2 K. B. 24, at pp. 27, 28.

[6] *Clifton* v. *Palumbo*, [1944] 2 All E. R. 497, at p. 509.

[7] *Inland Revenue Commissioners* v. *Joicey* (No. 1), [1913] 1 K. B. 445.

[8] *Re Wainewright* (1843), 1 Ph. 258 ; *R.* v. *Strachan* (1872), L. R. 7 Q. B., at p. 465.

[9] *Laird* v. *Briggs* (1880), 16 Ch. D. 440 ; doubted on appeal (1881), 19 Ch. D. 22, at p. 33. SCOTT, L. J., said, in *Winter* v. *Winter*, [1944] P. 72, at p. 74 ; " It was suggested in argument that to ascertain the meaning of the words ' exceptional hardship ' we might substitute other words for them. But to substitute another word for [that in] the statute is useless unless that word has a different meaning from the word in the statute ; and if it has, it is wrong to substitute it."

[10] *Salisbury* v. *Gilmore*, [1941] 2 All E. R. 817, at pp. 823–6, where HILBERY, J., said that as a rule it was preferable to transpose, rather than omit, words. On appeal, however, the Court of Appeal was able to construe the words as they stood, [1942] 2 K. B. 38. " If one transposes a few words at the end of the section . . . it then becomes clear " (*per cur.*, in *Love* v. *Norman Wright* (*Builders*), *Ltd.*, [1944] K. B. 484, at p. 489).

[11] *Metropolitan Board of Works* v. *Steed* (1881), 8 Q. B. D. 445.

[12] *Fowler* v. *Padget* (1798), 7 Term. Rep. 509 ; *Green* v. *Premier Glynrhonwy Slate Co.*, [1928] 1 K. B. 561, at p. 568.

[13] *Golden Horseshoe Estates* v. *The Crown*, [1911] A. C. 480.

[14] *Hewett* v. *Hattersley*, [1912] 3 K. B. 35 ; *Swan* v. *Pure Ice Co.*, [1935] 2 K. B. 265.

False Grammar

The case of false grammar is different. The Court will not allow a clear meaning to be defeated merely because the grammar is faulty.[1] "The rules of grammar must give way to the rules of good sense, and, where a reasonable interpretation of the whole instrument requires that grammar should be departed from, it must be, and constantly is, departed from." [2] Faulty grammar may, however, easily prevent the meaning from being clear and there is no real excuse for grammatical mistakes.

Writing and Print

The relative importance to be attached to written and printed words in the same document is a matter of interpretation of the words which are ascertained to be those forming part of the document. Words which have been deleted from the form are treated as if they had never been there, and cannot, for example, be used to interpret added words.[3] It also happens when a printed or multigraphed common form is used, especially in commercial documents designed to cover a variety of transactions, that whole clauses are left in which have no reference to the actual transaction, and in such a case they will be ignored. If, however, although apparently they should have been struck out, they can have an effect upon the actual transaction they must be taken into consideration.

(*c*) INTERPRETATION OF WORDS

Effect to be given to all Words

A document should not only be construed as a whole but also, if possible, be construed so as to give effect to every word,[4] and the Court is not at liberty to disregard a word if some meaning can be given to it.[5] It is to be assumed that additional words are not used without some purpose.[6] "I cannot see why, when a

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[1] *Parkhurst* v. *Smith* (1742), Willes 327, at p. 332; cf. *Eastwood* v. *Inland Revenue Commissioners*, [1943] 1 K. B. 314, at pp. 317, 318.

[2] *Re Norman's Trust* (1853), 3 De G. M. & G. 965, *per* KNIGHT BRUCE, V.C., at pp. 967–8.

[3] *Sassoon* v. *International Banking Corporation*, [1927] A. C. 711.

[4] *Blamford* v. *Blamford* (1615), 3 Bulst. 98, at p. 103; *Clarke* v. *Colls* (1861), 9 H. L. Cas. 601, at p. 612; *Massy* v. *Rowen* (1869), L. R. 4 H. L. 288, at p. 301; *Dickinson* v. *St. Aubyn*, [1944] K. B. 454, at p. 457.

[5] *Re Croxon, Croxon* v. *Ferrers*, [1904] 1 Ch. 252, at p. 258.

[6] *Oddie* v. *Woodford* (1821), 3 My. & Cr. 584, at p. 614; *Mersey Docks, etc. Board* v. *Henderson Bros.* (1888), 13 App. Cas. 595, at pp. 607–8; *Quarm* v. *Quarm*, [1892] 1 Q. B. 184, at pp. 186, 189.

testator has defined the objects to which he has referred both by time and by place, we should be forced to strike out from the will the reference to time as being an immaterial part of the description. Reading this simply as a piece of straightforward English I should have thought that the reference to time is just as essential a part of the description as the reference to place." [1]

The rule that effect should be given to every word does not involve the inference that words should be given a meaning which is not their usual meaning merely because they are surplusage in their ordinary meaning.[2] There is no presumption that each word used should change the meaning of the sentence. A word may be inserted for the sake of emphasis or for greater clearness, or descriptively, or because it occurs to the writer as suitable to the idea he is expressing, and even without any thought. The objection to an interpretation on the ground that it would make a word or phrase surplusage has weight only when the presence of the word or phrase would be unusual or unaccountable unless it were specially inserted for the purpose of altering the meaning of the sentence. The mere fact that it could be omitted without change of meaning has in itself no weight. There is no presumption that human beings use the irreducible minimum of words to effect their purpose,[3] and the House of Lords has decided that the latter part of the phrase " in addition to and not in derogation of " used in s. 1 (4) of the Law Reform (Miscellaneous Provisions) Act, 1934,[4] is tautologous.[5] The rule is not, however, to be applied so as to defeat the intention.[6] It may be possible to treat the apparently superfluous words as explanatory.[7] It is " a good general rule . . . that one who reads a legal document, whether public or private, should not be prompt to ascribe—should not without necessity or some sound reason impute—to its language tautology or superfluity." [8]

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[1] *Per* Lord GREENE, M.R., in *Re Whitby, Public Trustee* v. *Whitby*, [1944] Ch. 210, at p. 215.

[2] *Monk* v. *Mawdsley* (1827), 1 Sim. 286, at pp. 290, 291; *Hough* v. *Windus* (1884), 12 Q. B. D. 224, at pp. 229, 232; and see *Re Hooper, Phillips* v. *Steel*, [1944] Ch. 171, *per* UTHWATT, J., at p. 175.

[3] *Per* FLETCHER MOULTON, L.J., in *Re Boden, Boden* v. *Boden*, [1907] 1 Ch. 132, at p. 143. " The only possible construction of the words [in a statute] is that the expression ' arbitrator or umpire ' is tautologous " (*Re Eyre and Leicester Corpn.*, [1892] 1 Q. B. 136, *per* Lord ESHER, M.R., at p. 141). See also *per* LUXMOORE, L.J., in *Re Ward, Public Trustee* v. *Berry*, [1941] Ch. 308, at p. 318; and in *Re Grosvenor*, [1944] Ch. 138, at p. 149.

[4] 27 Halsbury's Statutes 221.

[5] *Davies* v. *Powell Dyffryn Ass. Collieries*, [1942] A. C. 601.

[6] *Sayer* v. *Bradly* (1856), 5 H. L. Cas. 873, at p. 899.

[7] *McLachlan* v. *Taitt* (1860), 2 De G. F. & J. 449, at p. 454.

[8] *Ditcher* v. *Denniscn* (1858), 11 Moo. P. C. 324, *per cur.*, at p. 337.

Fact or Law

It is sometimes difficult to say whether a question relating to a thing mentioned in a document is a question of fact or law. The distinction has been drawn in this way: "So far as the question whether a particular construction is a 'structure' or not, I agree that the justices are the only persons to decide it, for they hear the evidence . . . and are able to say what it is. But when the question . . . is . . . Is it a structure within the meaning of a particular bye-law, then different considerations apply, because in addition to considering the nature of the thing itself, somebody has to consider and decide upon the language of the byelaw, upon the terms of the byelaw, upon the terms of the statute under which the byelaw is made; probably upon the object of the byelaw, and in this case certainly upon the mischief intended to be prevented by the byelaw. In that state of things, I think it is quite obvious that the question [whether a particular construction was a 'structure' within the meaning of the byelaw] is a mixed question of law and fact." [1]

Words to be taken in Ordinary Sense

Prima facie words must be taken to have been used in their ordinary and grammatical sense.[2] This rule has been in existence for many years and is usually cited from Lord WENSLEYDALE, who stated it in several judgments. In *Grey* v. *Pearson* [3] he said: "In construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no farther." [4]

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[1] *Per* HUMPHREYS, J., in *Hobday* v. *Nicol*, [1944] 1 All E. R. 302, at p. 303.

[2] Examples are innumerable. One of the latest is *Rodger* v. *Varey*, [1942] 1 K. B. 508, where justices found themselves unable, in the absence of a definition, to decide whether the word "child" in a regulation included a girl of fourteen. The Divisional Court directed them that she clearly was a child. Probably the justices were misled by the definition of a "child" in the Children and Young Persons Act, 1933, excluding a child after its fourteenth birthday, when it becomes a "young person"; and see *Re Carlton*, [1945] Ch. 372, at p. 377. So also "purchase" of shares, without an appropriate context, does not include acquisition by allotment on subscription (*Re V.G.M. Holdings, Ltd.*, [1942] Ch. 235); "Knows" means "knows" and not "ought to have known" (*London Computator, Ltd.* v. *Seymour*, [1944] 2 All E. R. 11); and "and" means "and" in the absence of a compelling context to the contrary (*Re Welford's Will Trusts*, [1946] 1 All E. R. 23, at p. 25).

[3] (1857), 6 H. L. Cas. 61, at p. 106.

[4] See also *Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68; *Thellusson* v. *Rendlesham* (*Lord*) (1859), 7 H. L. Cas. 429, at p. 519.

Lord BLACKBURN was not much impressed by this statement. In *Caledonian Rail. Co.* v. *North British Rail. Co.*[1] he said that he agreed completely, but went on " but unfortunately in the cases in which there is real difficulty it does not help us much, because (they) are those in which there is a controversy as to what the grammatical and ordinary sense of the words, used with reference to the subject-matter, is." In *Hill* v. *East and West India Dock Co.*[2] Lord BRAMWELL said with reference to the exception as to an absurdity, etc., " That last sentence opens a very wide door. I should like to have a definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another." The rule has, however, been praised by many eminent judges both before and after Lord WENSLEYDALE, *e.g.* by Lord ELLENBOROUGH in *Doe* d. *Usher* v. *Jessep*,[3] by Lord CRANWORTH in *Gundry* v. *Pinniger*,[4] by JERVIS, C.J., in *Mattison* v. *Hart*,[5] and by MAULE, J., in *Gether* v. *Capper*.[6]

It seems certain that Lord WENSLEYDALE, when he uttered that " last sentence," was thinking only of the other rules that every document must be considered as a whole, and that words must be read in their context. The words of one clause taken alone may seem to be clear, but when read in conjunction with the other clauses, the apparently clear meaning may be shown to be inconsistent with the intention of the makers as appears from the document itself, and to give effect to such meaning would create an absurdity.[7] In such a case the clear meaning of the clause or sentence must obviously be modified, if it is possible, so as to make the document consistent with itself.[8] Again, where there are two possible meanings, this consideration will lead to the ordinary grammatical meaning being departed from, though not if there is only one meaning.[9] The exception cannot go further; because it is certain that, when no doubt exists as to the meaning of the words used, that meaning must be accepted.[10]

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[1] (1881), 6 App. Cas. 114, at pp. 131, 132.
[2] (1884), 9 App. Cas. 448, at pp. 464, 465.
[3] (1810), 12 East, 288, at p. 293.
[4] (1852), 1 De G. M. & G. 502.
[5] (1854), 14 C. B. 357, at p. 385.
[6] (1855), 15 C. B. 696.
[7] See *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, at p. 205; cf. *Woolfall and Rimmer, Ltd.* v. *Moyle*, [1942] 2 K. B. 66, at pp. 72, 73.
[8] See *Leader* v. *Duffey* (1888), 13 App. Cas. 294, at p. 301; *St. John, Hampstead, Vestry* v. *Cotton* (1886), 12 App. Cas. 1; *Allgood* v. *Blake* (1873), L. R. 8 Exch. 160, at pp. 163, 164.
[9] *Bathurst* v. *Errington* (1877), 2 App. Cas. 698; *Re Whitmore, Walters* v. *Harrison*, [1902] 2 Ch. 66; *Re Rothermere, Mellors, Basden & Co.* v. *Coutts & Co.*, [1943] 1 All E. R. 307, at p. 308.
[10] *Warde* v. *Plumb* (1870), 22 L. T. 723; (on appeal) (1871), 40 L. J. Ex. 105; *Enlayde* v. *Roberts*, [1917] 1 Ch. 109.

With regard to wills, in *Abbott* v. *Middleton*, *supra*, where Lord WENSLEYDALE also stated the principle,[1] it must be so limited, since "no man is bound to make a will in such manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident and is moreover at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious, and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily."[2] It must be remembered that the Courts have been given a limited power to alter in certain cases the dispositions made by a testator in his will (Inheritance (Family Provision) Act, 1938).[3]

Similarly, subject to the rules of law applicable, a man is entitled to make such agreements and such dispositions of his property as he thinks fit. The Court will look at the document, and give it the construction which it bears irrespective of whether it is wise or foolish in the opinion of the judge or of anyone else. But a man is at least expected to be consistent in one and the same document, and the Court must take great care to be sure that an unwise or absurd provision was what he really intended. In no case can conjecture replace the language used or the judge lend his wisdom and experience to reshape what a foolish and ignorant person has really done.

Rule in relation to Statutes

The same principle applies to statutes. The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results that would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending such an interpretation as would disregard fundamental principles, then we may be justified in adopting an alternative interpretation. At the same time, if the choice is between two interpretations, one of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and

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[1] The passage from this judgment is cited in *Cave* v. *Horsell*, [1912] 3 K. B. 533, at pp. 537, 542; and in *Victoria City Corporation* v. *Vancouver Island* (*Bishop*), [1921] 2 A. C. 384, at p. 387.

[2] *Per* WIGRAM, V.C., in *Bird* v. *Luckie* (1850), 8 Hare, 301, at pp. 306, 307.

[3] 31 Halsbury's Statutes 149.

should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.[1] "It is essential to approach the construction . . . without undue bias in favour of the strict law which the enactment is setting out to change. It is wrong to construe it in a niggardly and technical spirit, with an eye fixed on the old law. If it is approached in that spirit, it may be easy to eviscerate the enactment and deprive it of any effect. At the same time its effect must be ascertained in a fair and reasonable light of the whole tenor of the section read as forming part of the . . . legislation." [2]

Thus, where the words of a statute are clear, the Courts have no dispensing powers to avoid consequences which follow from the enactment, even when it would seem certain that Parliament would have avoided those consequences had they been brought to its notice.[3] The Poor Rate (Assessment and Collection) Act, 1869, s. 16,[4] provided that if an occupier ceased to occupy during the currency of the rate, the overseers should insert the name of his successor, and the outgoing occupier should only be liable for his due proportion. It omitted to deal with the case where there was no successor, and therefore the outgoing occupier was held liable for the whole rate.[5] The law was altered by statute in 1882. A statute imposed a penalty on any person who piloted a ship in the Thames before he had been admitted a Trinity House pilot. This was held not to apply to a man who had been admitted and expelled.[6] The Matrimonial Causes Act, 1857, s. 21,[7] provided that an order protecting the earnings of a married woman could be discharged by the magistrate who made it. He having died, there was no one who could discharge it.[8] A statute authorising removal of lunatics when there was no asylum in the county did not apply when there was an asylum but it was too full to receive any more.[9] In all these cases, which can be added to indefinitely, the words of the statute were clear, and in such cases the Courts cannot add words to or take away words from the statute.[10] "It may be that a literal construction omits some cases for which another construction would

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[1] *Nokes* v. *Doncaster Amalgamated Collieries*, [1940] A. C. 1014, at p. 1022; *Whitney* v. *Inland Revene Comnrs.*, [1926] A. C. 37, at p. 52.

[2] *Per* Lord WRIGHT in *Earl Fitzwilliam's Collieries Co.* v. *Phillips*, [1943] A. C. 570, at p. 580. Cf. *Hood-Barrs* v. *Comnrs. of Inland Revenue*, [1945] 1 All E. R. 500, at p. 506.

[3] *Field* v. *Gover*, [1944] K. B. 200, *per* GODDARD, L.J., at p. 213.

[4] 14 Halsbury's Statutes 550.

[5] *St. Werburgh's Overseers* v. *Hutchinson* (1879), 5 Ex. D. 19.

[6] *Pierce* v. *Hopper* (1720), 1 Stra. 249.

[7] 9 Halsbury's Statutes 387.

[8] *R.* v. *Arnold* (1864), 5 B. & S. 322.

[9] *R.* v. *Ellis* (1844), 6 Q. B. 501.

[10] *Thompson* v. *Goold & Co.*, [1910] A. C. 409; *Vickers, Sons and Maxim, Ltd.* v. *Evans*, [1910] A. C. 444; *cf. Robinson* v. *London Brick Co.*, 1942] 2 K. B. 239, at p. 243.

provide, but that is not in my opinion a good reason for modifying or extending the plain words of the section." [1]

Technical Words and Terms of Art

As ordinary words are to be taken in their ordinary meaning, so technical words, and words of known legal import, are to be taken in their technical meaning, unless the context clearly shows the contrary.[2] For example, " when a testator has used words which have acquired a definite meaning in conveyancing and have for a long time been used in the drafting of wills and settlements and other like documents with that meaning, it requires a very strong case to justify their interpretation in a different sense." [3]

This rule applies to all documents.[4] Thus statutes when dealing with particular trades or businesses or dealings will use the words appropriate to such concerns and *prima facie* in the meaning that they bear in that connection.[5] Wills and deeds, as above stated, frequently contain technical words, and *prima facie* these are given their proper meaning.[6] The same applies to contracts. Merchants make their contracts in the words they are accustomed to use and those words bear the meaning that merchants put upon them.[7] The general rule is that where there is nothing to show that parties have used language in any other than its ordinary sense and where the words interpreted in that sense are sensible in relation to the extrinsic circumstances, then the words are interpreted in that sense and no other, though they may be capable of some secondary interpretation and evidence that they were intended to be used in that interpretation is tendered.[8] Where a word or phrase is technical then the technical meaning is the primary meaning. It often happens, therefore, that evidence of that meaning is required.[9] But where a word has both a popular and a technical meaning, the Court has to be satisfied from the document [10] or the surrounding

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[1] *Per* GODDARD, L.J., in *Re Grosvenor*, [1944] Ch. 138, at p. 152.

[2] *Jenkins* v. *Comnrs. of Inland Revenue*, [1944] 2 All E. R. 491, *per* Lord GREENE, M.R., at p. 495; *Westminster* (*Duke*) v. *Store Properties, Ltd.*, [1944] Ch. 129, at p. 131. So " debt " in a statute means " actionable debt " (*R.* v. *Leon*, [1945] K. B. 136; but see *Bonham* v. *Zurich, etc. Ins. Co., Ltd.*, [1945] K. B. 292).

[3] *Re Harcourt, Portman* v. *Portman*, [1921] 2 Ch. 491, *per* STERNDALE, M.R., at p. 503, affirmed, [1922] 2 A. C. 473; and as to a settlement, *Re Bostock's Settlement, Norrish* v. *Bostock*, [1921] 2 Ch. 469, at p. 480.

[4] *Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823.

[5] *Unwin* v. *Hanson*, [1891] 2 Q. B. 115, at p. 119; *L.N.E.R. Co.* v. *Berriman*, [1946] 1 All E. R. 255, at pp. 260, 266, 268.

[6] *Parr* v. *A.-G.*, [1926] A. C. 239, at p. 266.

[7] *Re Land Securities Co., Ex parte Farquhar*, [1896] 2 Ch. 320; *Southland Frozen Meat and Produce Export Co.* v. *Nelson*, [1898] A. C. 442.

[8] *Enlayde* v. *Roberts*, [1917] 1 Ch. 109.

[9] *Brown* v. *Byrne* (1854), 3 E. & B. 703, at p. 715, and see the cases cited *ante* p. 30 with reference to evidence.

[10] *Patent Castings Syndicate* v. *Etherington*, [1919] 2 Ch. 254.

circumstances that it is not used in the popular meaning before the technical meaning will be ascertained or applied.[1] Where a marine insurance policy contained the words " No St. Lawrence," and the underwriters refused to pay as the ship had navigated in the Gulf of St. Lawrence, the shipowners contended that the words only applied to the River St. Lawrence and not to the Gulf. No general custom of merchants was proved and the Court therefore applied the ordinary meaning which included both River and Gulf.[2]

Alternative Meanings

Too little attention has been given to the fact that many words have a number of meanings, any one of which may be appropriate, and that in such a case the selection of the intended meaning may be difficult. Where words have several meanings, the one which is appropriate in the context should be taken, and, if possible, that one which will carry out the intention,[3] but words will not be given a meaning that they cannot bear merely in order to effectuate the intention.[4] Assistance can often be derived from the context, especially where words are used in conjunction or contrast or where the *ejusdem generis* rule applies.

Words must be capable of Meaning adopted

Where the ordinary or technical meaning of words is excluded by reason of the context, then they must be given such of the other meanings of which they are capable as will carry out the intention which has been ascertained from the document as a whole and the surrounding circumstances. The Court cannot put upon them a meaning of which they are not capable. The meaning of words is not to be found in etymology or even in a dictionary, but with regard to the subject or occasion on which they are used and the intention as above ascertained in the context in which they appear.[5]

Context

It has already been pointed out that a word may have a modified or different meaning when used in conbination with other words. The position in a phrase or sentence may also affect the sense in which a word is used. But the context in which a word appears may also indicate in relation to a word which has several meanings,

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[1] *Holt & Co.* v. *Collyer* (1881), 16 Ch. D. 718, at p. 720; *Bruner* v. *Moore*, [1904] 1 Ch. 305.

[2] *Birrell* v. *Dryer* (1884), 9 App. Cas. 345.

[3] *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124, at p. 154.

[4] *Mersey Docks and Harbour Board* v. *Henderson Brothers* (1888), 13 App. Cas. 595, at p. 603.

[5] *R.* v. *Hall* (1822), 1 B. & C. 123, at p. 136; cf. *Hume* v. *Rundell* (1824), 2 Sim. & St. 174, at p. 177; *Ford* v. *Beech* (1848), 11 Q. B. 852, at p. 866.

especially when it has meanings which almost insensibly pass from one to another, which of those several meanings it is in fact intended to convey, or may negative any suggestion that one or more of its possible meanings can have been intended. The context may therefore have a positive or a negative effect in determining the precise meaning which a word is intended to convey in the context in which it appears. Although the context cannot give to a word a meaning of which that word is not capable,[1] it can, and often does, afford a means of selecting the precise one of its various meanings that the word does in fact bear.

The expression "context" is a vague one. It may mean the whole document, or some particular part of the document, or it may be used to refer to the words found in immediate relation to the word under consideration. The Court will take into consideration such of the other words of the document as in the particular case will assist it in ascertaining the meaning of the word or phrase or sentence under consideration. In such cases the words taken into consideration constitute the "context." "In order to justify a departure from the natural or ordinary meaning of any word or phrase, there must be found in the instrument containing it a context which necessitates or justifies such departure. It will not be enough that the natural and ordinary meaning may produce results which to some minds appear capricious or fail to accord with a logical system of disposition" (in a will).[2]

Variation of Ordinary Meaning

Thus, a vagabond is a wanderer, but a person who is wandering about is not necessarily a vagabond within the meaning of the Vagrancy Act, 1824[3]; a beggar is a person who solicits money, but a collector for a *bona fide* street collection for a charity is not a beggar within the meaning of s. 3 of the same Act.[4] Water is a well-known substance having a definite composition and a table is a familiar article of domestic furniture, but a water-table is a technical term and is certainly not a table made of water or for water, and strong waters are not waters of a peculiar strength. Nor can something which is different from be made the same as another thing merely by giving it the same name. Neither a gas-rate nor a water-rate is a rate, which is a legal term having a definite meaning, and the collection by gas and water authorities of such

[1] Of course, a statute or even a private document may define the expressions used in it, and in such cases the meaning of the expressions so used depends upon the definitions, which may enlarge or restrict the ordinary or possible meaning of those expressions. See p. 106, *post*.

[2] *Gilmour* v. *MacPhillamy*, [1930] A. C. 712, at p. 716, P. C.

[3] *Monck* v. *Hilton* (1877), 2 Ex. D. 268 (for Vagrancy Act, 1824, see 12 Halsbury's Statutes 913).

[4] *Mathers* v. *Penfold*, [1915] 1 K. B. 514.

rates is governed by wholly different provisions. It has a different meaning again in the expression " rate of pay " or " deduction of tax at the standard rate." The meaning of a word may thus be limited or extended. Thus a " parent " has been held by reason of the subject-matter to include a putative father,[1] though in the ordinary legal meaning he is not a parent, and in fact may not be one at all. A married woman may for certain purposes be a " single woman." [2] The terms " nephew " or " niece " may by the context be extended so as to include persons who are not strictly so included.[3] " Gas " has been held to mean only ordinary illuminant gas in a policy covering loss by gas explosion,[4] and the word "rubbish" limited by the context in the expression " rubbish resulting from the demolition." [5] " Month " means either calendar or lunar month, and at common law *prima facie* meant lunar month, but the context might show that calendar month is intended,[6] and this was the case in commercial contracts long before usage made a change in ordinary speech. In instruments made or coming into operation since 1925 the word means calendar month, unless the context otherwise requires.[7] This has been the rule as to statutes passed after 1850.[8]

Noscitur a sociis and Ejusdem generis

Closely connected with the rule that the meaning of a word may be modified by the context is the rule known as the *Ejusdem generis* rule and sometimes as the rule *noscitur a sociis*.[9] It is to be observed, however, that the latter expression is apt to cover a wider class than the former. It would be of advantage to use the expression " *noscitur a sociis* " to indicate the cases where the exact meaning to be attributed to a word or phrase having several possible meanings is ascertained by comparison or contrast with other similar terms also appearing in connection with the same subject matter. Thus, " the question, after all, must be, what is ' construction ' and what is ' repair ' in this Act of Parliament, where ' construction ' and ' repair ' are associated together in the phrase ' construction or repair.' " [10] Again, in determining what is meant by a ship being

[1] *R.* v. *Cornforth* (1742), 2 Stra. 1162

[2] *Jones* v. *Evans*, [1944] K. B. 582.

[3] *Re Daoust*, [1944] 1 All E. R. 443, *per* VAISEY, J., at p. 444 ; see also *Re Cooper*, p. 36, *ante*.

[4] *Stanley* v. *Western Insurance Co.* (1868), L. R. 3 Exch. 71.

[5] *McVittie* v. *Bolton Corporation*, [1945] K. B. 281.

[6] *Lang* v. *Gale* (1813), 1 M. & S. 111 ; *Schiller* v. *Petersen*, [1924] 1 Ch. 394.

[7] Law of Property Act, 1925, s. 61 ; 15 Halsbury's Statutes 238.

[8] Lord Brougham's Act, 13 & 14 Vict. c. 21.

[9] *E.g.* by GODDARD, L.J., in *Alexander* v. *Tredegar Iron &c. Co., Ltd.*, [1944] K. B. 390, at p. 393.

[10] *Hoddinott* v. *Newton*, [1901] A. C. 49 ; *L.N.E.R. Co* v. *Berriman*, [1946] 1 All E. R. 255.

laid up in a case where the expression is "sold or laid up," "I am of opinion that the words 'laid up,' being in company with the word 'sold,' must mean a permanent laying up, similar to that which would take place if the ship had been sold, that is, such a laying up as would put a final end to the policy." [1]

Ejudem generis Rule

This restriction would leave the expression *ejusdem generis* to describe the rule that, where general words follow particular words which are species of a single genus, the general words are *prima facie* descriptive only of other species of the same genus, or, as it is otherwise put, the general words are construed *ejusdem generis*.[2] For example, "the word 'device' . . . refers to things *ejusdem generis* with 'signals, warning sign posts, direction posts and signs' —which words precede 'device' in the subsection—and no one would dream of saying that a painted line on the highway was of the same character as a sign post or a direction post or a sign of that nature." [3]

This rule must be applied with caution, "because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the Legislature." [4] It is not, however, so much a departure from a natural meaning as a restriction to some one only of the natural meaning of the words. The general words must have been used for some purpose. "It is true that these general words have to be considered as restricted to cases akin to or resembling or of the same kind as those specially mentioned . . . but, subject to that limitation, they may be used to give some extension to the specific [words]." [5]

The rule will not apply if there is no such genus as will include the particular words as species,[6] or if the particular words belong to different genera [7] or themselves exhaust the genus and so leave

[1] *Per* Lord TENTERDEN, C.J., in *Hunter* v. *Wright* (1830), 10 B. & C. 714, at p. 716; and see *per* EVANS, P., in *The Nicolay Belozwetow*, [1913] P. 2, at pp. 4, 5.

[2] *Thames and Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490.

[3] *Per* Lord HEWART, C.J., in *Evans* v. *Cross*, [1938] 1 K. B. 694, at p. 696.

[4] *Per* GODDARD, L.J., in *Alexander* v. *Tredegar Iron, &c. Co., Ltd.*, [1944] K. B. 390, at p. 393.

[5] *Per* Lord WRIGHT in *Canada Rice Mills* v. *Union, Marine, etc. Ins. Co.*, [1941] A.C. 55, at pp. 71–2.

[6] See *per* Lord SIMON, C., in *National Assoc. of Local Govt. Officers* v. *Bolton Corpn.*, [1943] A. C. 166, at pp. 176–7.

[7] *Anderson* v. *Anderson*, [1895] 1 Q. B. 749; *S.S. Magnhild (Owners)* v. *Macintyre*, [1920] 3 K. B. 321; (on appeal), [1921] 2 K. B. 97; and see *Egham & Staines Electy. Co., Ltd.* v. *Egham U.D.C.*, [1942] 2 All E. R. 154, at p. 157.

nothing to which the general words can apply.[1] It is sometimes difficult to ascertain the genus. Where the words are followed by an exception there is some assistance, because "words excepting a species from a genus are meaningless unless the species in question *prima facie* falls within the genus. 'All hats other than top hats' makes sense. 'All top hats and other articles (except gloves)' [does not] if 'articles' is to be construed *ejusdem generis* with 'hats.' No case was cited to us in which a genus has been held to be constituted, not by the enumeration of a number of classes followed by the words 'and other,' but by the mention of a single class . . . followed by those words. . . . The tendency of the more modern authorities is to attenuate the application of the *ejusdem generis* rule."[2] As a help in ascertaining the genus, it is considered that general words following an enumeration of persons or things will not include persons or things of a higher status or quality or worth than those enumerated. Thus, bishops are of a higher status than deans and priests and, therefore, would not be included in general words following a mention of the two latter,[3] and an enumeration of base metals followed by general words would not be interpreted as including precious metals, such as silver and gold.[4]

The rule may be excluded by the very wording of the general words, which may clearly indicate that their generality is not to be limited by the rule, and also by other considerations that outweigh the rule, *e.g.*, that the restricted meaning does not carry out the object or intention,[5] or that the words appear in a penal statute,[6] or in a will when the presumption against intestacy applies,[7] and therefore, general words in a residuary gift may be given the larger meaning to avoid a partial intestacy.[8]

There appears to be no case where the *ejusdem generis* rule has been applied to general words that precede specific words.[9]

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[1] *R.* v. *Payne* (1866), L. R. 1 C. C. R. 27; *Knight Sugar Co., Ltd.* v. *Alberta Rail. and Irrigation Co.*, [1938] 1 All E. R. 266, at p. 269, and see *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, at p. 315.

[2] *Per* ASQUITH, J., in *Allen* v. *Emmerson*, [1944] K. B. 362, at pp. 366–7.

[3] *Canterbury's (Archbp.) Case* (1596), 2 Co. Rep. 46, a; *Copland* v. *Powell* (1823), 1 Bing. 369.

[4] *Casher* v. *Holmes* (1831), 2 B. & Ad. 592; cf. *R. v. Eyre* (1868), L. R. 3 Q. B. 487; and *Cope* v. *Barber* (1872), L. R. 7 C. P. 393.

[5] *Woolcomb* v. *Woolcomb* (1731), 3 P. Wms. 112; *Hawke* v. *Dunn*, [1897] 1 Q. B. 579; *Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143; and *Cannan* v. *Abingdon (Earl)*, [1900] 2 Q. B. 66.

[6] *Myers* v. *Veitch* (1869), L. R. 4 Q. B. 649; *Killin* v. *Swatton* (1896), 76 L. T. 55.

[7] *Gibbs* v. *Lawrence* (1860), 30 L. J. (Ch.) 170; *Re Recknell, White* v. *Carter*, [1936] 2 All E. R. 36.

[8] *Parker* v. *Marchant* (1842), 1 Y. & C. Ch. Cas. 290, at p. 291; (on appeal) (1843), 1 Ph. 356.

[9] *Ambatielos* v. *Anton Jurgens Margarine Works*, [1923] A. C. 175, at p. 183.

Definition Clauses

Sometimes a statute gives a definition, either for a section or part of the Act or for the whole Act, or for all statutes or even for other documents. A familiar example is the Interpretation Act, 1889,[1] and after the 1914-18 war a good deal of litigation was avoided by the Termination of the Present War (Definition) Act, 1918.[2] The meaning may be authoritatively declared and then no extrinsic evidence is admitted to show some other meaning.[3]

Most statutory definitions, however, are subject to an express exception such as " unless the contrary intention appears," and in such cases a restricted or extended meaning may be given to the word even in the statute.[4] Such definitions are intended to be used for the particular purposes of the Act, or Part or section of the Act, which contains them. " It is always unsatisfactory, and generally unsafe, to seek the meaning of the words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same Legislature." [5]

In the case of meanings given to words by statute and applicable to all instruments, parties who wish to use the words in a different sense must say so expressly or it must clearly appear to be so from the context.

If the parties to private documents desire to insert a clause giving definitions of the words used in those documents, they may do so. A definition clause is often found in Articles of Association of a registered company.

Change of Meaning

A document may have to be construed many years after it came into existence, and in the meantime not only the law but also the meanings of words used in the document may have changed. Due account must be taken of such changes, as a document operates according to the law then in force and its words have the meaning attributed to them at the date when the document came into operation. If necessary, therefore, evidence will be admitted to show what the meaning was at that date.[6] *Contemporanea expositio* which is

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[1] 18 Halsbury's Statutes 992. [2] 3 Halsbury's Statutes 514.

[3] As in weights and measures, *Noble* v. *Durell* (1789), 3 Term. Rep. 271 ; *Wing* v. *Earle* (1592), Cro. Eliz. 267.

[4] For an example see *Canadian Eagle Oil Co., Ltd.* v. *R.*, [1946] A. C. 119, at p. 134.

[5] *Adamson* v. *Melbourne and Metropolitan Board of Works*, [1929] A. C. 142, at p. 147 (P. C.).

[6] *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, at p. 565 ; *Drummond* v. *A.-G. for Ireland* (1849), 2 H. L. Cas. 837, at p. 863 ; *De la Warr (Earl)* v. *Miles* (1881), 17 Ch. D. 535, at p. 573 ; *Shepherd* v. *Hills* (1855), 11 Exch. 55, at p. 67 ; *Great Western Rail. Co.* v. *Carpalla United China Clay Co., Ltd.*, [1909] 1 Ch. 218, at pp. 236, 237 ; and see *ante*, p. 19.

used to clear up ambiguities is also available to establish the former meaning and effect of the words.

Words may have received an authoritative exposition and then have altered their meaning. In construing a document made after such change has occurred, full allowance must be made.[1]

Repetition

It is said that, when a word is used more than once in an instrument, it is to be assumed that it is used in the same sense on each occasion,[2] and also that, if in connection with the same subject-matter the word is changed, it has been done intentionally in order to change the meaning.[3] On the other hand, even in statutes, changes of words may occur without a change of meaning.[4] A parliamentary draftsman does not necessarily use the same set of words to express the same idea.[5]

Same Word in Same Sense

It is certainly a wise rule for a draftsman always to use the same word with the same meaning and to change the word when he changes the meaning and only then, but it would appear that the above statement is not a rule but a consideration to be borne in mind. Words are to be construed in their context, and this has led some judges to utter *dicta* that there is no such rule or that it is subject to the main rule that words are to be taken in their context.[6]

[1] Thus, " plate " which used to be used only in reference to gold and silver, may now cover Sheffield plate or electro-plate (*Re Grimwood, Trewhella* v. *Grimwood*, [1946] Ch. 54, and see *ante*, p. 19).

[2] *Re National Savings Bank Association* (1866), 1 Ch. App. 547, at p. 550; *Doe* d. *Bridgman* v. *David* (1834), 1 Cr. M. & R. 405, at p. 408; *Tithe Redemption Commission* v. *Queen Anne's Bounty*, [1946] 1 All E. R. 148, *per* ROMER, J., at p. 158.

[3] *Brighton Parish Guardians* v. *Strand Union Guardians*, [1891] 2 Q. B. 156, at p. 167; and see *Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1, at p. 8.

[4] *Barnard* v. *Gorman*, [1941] A. C. 378; *Liversidge* v. *Anderson*, [1942] A. C. 206, at pp. 282, 283, where Lord ROMER said: " . . . attention . . . was very properly drawn by way of contrast to the language used in some of the other regulations. . . . There would be more force in this argument if all the regulations were contained in one Act of Parliament or in a set of regulations all framed at one time, though, in view of the fact that different language is frequently employed in the regulations to express the same thing, I should not even in that case have been greatly impressed by it. But the regulations and even some clauses of the same regulation came into existence at different times and for all that I know to the contrary were the produce of different hands. In these circumstances it is impossible to infer that a difference in the language used in two regulations necessarily indicates an intention to express two different meanings."

[5] *Per* Lord WRIGHT in *Davies* v. *Powell Dyffryn Ass. Collieries*, [1942] A. C. 601, at pp. 614, 615; and see *Liversidge* v. *Anderson*, *supra*.

[6] *Neathway* v. *Reed* (1853), 3 De G. M. & G. 18; *Re Warren's Trusts* (1884), 26 Ch. D. 208, at p. 216; *Edyvean* v. *Archer*, [1903] A. C. 379, at pp. 384–5; *Re Cozens, Miles* v. *Wilson*, [1903] 1 Ch. 138, at p. 143.

FRY, L.J., remarked that though a word is used inaccurately once, it is not necessarily used inaccurately elsewhere,[1] and in *Re Ridge, Hancock* v. *Dutton*,[2] the fact that testatrix gave a legacy to a great-nephew, describing him as her "nephew," did not avail to let her great-nephews and great-nieces in to share her residue which by the will was given to her "nephews and nieces." The principle has been put in the form that, if the meaning of the word is not clear, reference may be made to its use elsewhere in the document in order to fix the meaning.[3] Where a word appears in a special meaning in one clause of a will the Court will not necessarily give it that meaning in another clause not connected with the first clause,[4] and this applies to all instruments.[5] Lord SELBORNE said [6] that the rule like many other such canons of construction is very far from universal and will always require a good deal of care in the application of it.[7] There are certainly many examples where the rule, if it is a rule, has been departed from.[8] Thus, it has been held that a word may be used in different senses in the same section [9] or sentence,[10] and also in different sections.[11] Recently the Court of Appeal held that the word "offender" in the expression "the offender may either be detained or proceeded against by summons" meant "a person actually guilty" in connection with detention and an accused person in connection with a summons. The House of Lords, however, held that the word meant "suspected offender" in both connections.[12] "I cannot think that in a sentence which uses the words 'the offender' only once and then provides for his alternative treatment, the word has a different meaning with a different content according to the alternative adopted." [13] Again, "If the defendant's argument is correct, the strange result must follow that in the body of the first subsection and in its first two provisoes,

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[1] *Re Moody and Yates' Contract* (1885), 30 Ch. D. 344, at p. 346.

[2] (1933), 149 L. T. 266.

[3] *Re Birks, Kenyon* v. *Birks*, [1900] 1 Ch. 417, at p. 418.

[4] *Doe* d. *Cock* v. *Cooper* (1801), 1 East, 229, at p. 233.

[5] *Re Warren's Trusts* (1884), 26 Ch. D. 208, at p. 216. "A mere contrast in language between section and section may be . . . explained by reference to the difference in subject-matter rather than by an intention to produce a different result," *per* Lord PORTER in *King Features Syndicate* v. *Kleemann, Ltd.*, [1941] A. C. 417, at p. 451.

[6] In *Clifford* v. *Koe* (1880), 5 App. Cas. 447, at p. 459.

[7] And see *Re Hickey, Beddoes* v. *Hodgson*, [1917] 1 Ch. 601.

[8] *Thames Conservators* v. *Smeed, Dean & Co.*, [1897] 2 Q. B. 334, at p. 346.

[9] *Doe* d. *Angell* v. *Angell* (1846), 9 Q. B. 328, at p. 355; *R.* v. *Allen* (1872), L. R. 1 C. C. R. 367, at pp. 373, 374; *Re Smith, Green* v. *Smith* (1883), 24 Ch. D. 672, at p. 678.

[10] *Doe* d. *Chattaway* v. *Smith* (1816), 5 M. & S. 126.

[11] *Whitley* v. *Stumbles*, [1930] A. C. 544, at p. 547; *Rogers* v. *Henlys, Ltd.*, [1945] 1 All E. R. 423, at pp. 424–5.

[12] *Barnard* v. *Gorman*, [1941] A. C. 378.

[13] *Per* Lord SIMON, C., in *Barnard* v. *Gorman*, [1941] A.C. at p. 385.

the word 'interest,' in spite of the absence of any context to justify such a view, must be taken to be used in varying senses." [1]

When it is said that in construing the statute [2] the same effect must be given to the word "marry" in both parts of the sentence and that consequently, as the first marriage must necessarily be a perfect and binding one, the second must be of equal efficacy in order to constitute bigamy it is at once self evident that the proposition as then stated cannot possibly hold good.[3]

It seems only common sense to approach the reading of a document with the assumption that *prima facie* the same word has the same meaning, but the context may show that it bears a different meaning on one or more of the occasions on which it is used. And it is also permissible to use the meaning of a word where in its context it is clear in order to assist in ascertaining its meaning where in its context the word is not clear. In the Privy Council it has been held that there is no general rule that an expression bears the same meaning throughout and the assumption is only of use in cases of doubt or ambiguity.[4]

Change of expression has been relied on as shewing a change of meaning.[5] "Where the Legislature uses two different expressions in close proximity it does not intend the same meaning." [6]

Relative Words

Relative words are said to be, in strict grammatical construction, applied to the last antecedent, but this rule is not observed without exception, even by the writers of the best English. The relative is applied to the antecedent, whether last or not, with which it makes sense, and, if it makes sense with more than one, then to such one, or perhaps more, with which it makes the sense that is consistent with the intention of the instrument.[7] A relative word, *e.g.* "such," may be used in reference to an antecedent or may itself be antecedent to some other word.[8] Relative terms can only be under-

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[1] *Westminster Bank, Ltd.* v. *Riches*, [1945] 1 All E. R. 466, at p. 478 (affirmed [1945] Ch. 581).

[2] Offences against the Person Act, 1861, s. 57, "Whosoever, being married, shall marry any other person . . ."

[3] *R.* v. *Allen* (1872), L. R. 1 C. C. R. 367.

[4] *Watson* v. *Haggitt*, [1928] A. C. 127.

[5] *Per* GODDARD, L.J., in *Dickinson* v. *St. Aubyn*, [1944] K. B. 454.

[6] *London C.C.* v. *Lee*, [1914] 3 K. B. 255, *per* AVORY, J., at p. 257.

[7] *Staniland* v. *Hopkins* (1841), 9 M. & W. 178, at pp. 192, 193; *Thellusson* v. *Woodford* (1805), 1 Bos. & P. N. R. 357, at pp. 392, 393; *Eastern Counties Rail. Co.* v. *Marriage* (1860), 9 H. L. Cas. 32, at pp. 37, 44, 54, 64, 74; *Tetley* v. *Wanless* (1866), L. R. 2 Exch. 21, at p. 29. An early example is *Hartingford* v. *Redborn* (1727), Sess. Cas. (K. B.) 147, where the Court declined to apply the relative to the last antecedent.

[8] *Stolworthy* v. *Sancroft* (1864), 33 L. J. (Ch.) 708, *per* KINDERSLEY, V.-C., at p. 710.

stood by reference to the scheme of the document.[1] Evidence is not admitted for the purpose of clearing up grammatical difficulties caused by the use of relative words, though it may be as to identity.

General Words

General words may appear with or without specific words being associated with them. Like all other words they must receive a construction which gives effect to them, and, although ordinarily they must receive some limitation, they ought not to be cut down further than the sense or the object of the document requires.[2] Whenever specific words are used to express the object or intention and general words are found in the document which in their widest sense will be inconsistent with that object or intention, then the general words must be limited so as to be consistent therewith.[3] The object or intention may be ascertained from recitals or the context,[4] or the subject-matter,[5] or surrounding circumstances.[6] But the wideness of the language alone is not a sufficient reason for putting a narrow construction on it.[7]

Further, "where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."[8]

Expressio unius

The maxims *expressum facit cessare tacitum* and *expressio unius est exclusio alterius* emphasise the negative aspect of the rule as to implied terms. If parties take the trouble to set out the obligations or conditions or any other term, they presumably have set out all

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[1] *Re Colvile, Colvile* v. *Martin* (1911), 105 L. T. 622.

[2] *Minet* v. *Leman* (1855), 20 Beav. 269; *A.-G.* v. *Exeter Corporation*, [1911] 1 K. B. 1092.

[3] *Margetson* v. *Glynn*, [1892] 1 Q. B. 337, at p. 344; (on appeal) *sub nom. Glynn* v. *Margetson & Co.*, [1893] A. C. 351.

[4] *Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500; *Hemmings* v. *Sceptre Life Association*, [1905] 1 Ch. 365; *Blackwood* v. *R.* (1882), 8 App. Cas. 82, at p. 94; cf. *Re German Date Coffee Co.* (1882), 20 Ch. D.169, at p. 188.

[5] *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490. "Quay or other place" is not a phrase of this kind (*Emerson* v. *Woods*, [1942] N. I. 118). There is only one word and that is not a genus.

[6] *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, at p. 353.

[7] *No-Nail Cases Proprietary, Ltd.* v. *No-Nail Boxes, Ltd.*, [1944] K. B. 629, at p. 640 (affirmed, [1946] 1 All E. R. 523, n. H. L.)

[8] *Seward* v. *Vera Cruz* (1884), 10 App. Cas. 59, at p. 68; *Gloucester (Bp.)* v. *Cunnington*, [1943] K. B. 101, at p. 103; *Leivers* v. *Barber, Walker & Co.*, [1943] 1 K. B. 385, at pp. 391, 392.

that are intended to be binding.[1] On an advance on mortgage, the law implies a personal covenant to repay, but if there is an express covenant to repay out of a particular fund the implied covenant is excluded,[2] and the implication of covenants from the use of the word " demise " is excluded by an express covenant for quiet enjoyment.[3] An authority to deal with property in a particular way negatives any authority to deal with it in other ways.[4] A conveyance of several hereditaments together with the fixtures in one of them does not carry the fixtures in the others.[5] It is therefore obvious that where provision is made when previously and otherwise there would be no obligation, the parties have expressed their intentions and should not have them extended by implication,[6] and if the law implies certain obligations where nothing is said, the fact that the parties have made express provision on the matter negatives the conclusion that they intend to be bound by the terms implied by law. Thus where a lease contained an express covenant by the lessee to erect buildings by a certain date, a continuing covenant to erect them could not be implied from a subsequent covenant to repair them.[7] These rules have to be applied with caution, as they do not represent the whole doctrine of interpretation and are not to be allowed to defeat the intention of the parties. Thus, if a person agrees to do something and his ability to do it depends on the continuance of a particular state of things, though nothing is said, yet he will be under an implied duty not to do anything which will put an end to that state of things [8]; and if A agrees with B to buy something from B, then B, even if nothing be said, will thereby be bound to sell to A [9]; so too if A agrees with B that he shall manufacture certain goods, B, thereby in the absence of any other provision, is bound to take them.[10] It therefore follows that the maxim must be used with caution and only in such cases as those where the express and implied terms cannot co-exist. A failure to express the matter completely may be purely accidental, as it may never have struck the draftsman that it needed mention.[11]

[1] *Aspdin* v. *Austin* (1844), 5 Q. B. 671, at p. 684; *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, at p. 265.

[2] *Mathew* v. *Blackmore* (1857), 1 H. & N. 762, at pp. 771, 772.

[3] *Nokes' Case* (1599), 4 Co. Rep. 80b; *Line* v. *Stephenson* (1838), 5 Bing (N. C.) 183; and see *Markham* v. *Paget*, [1908] 1 Ch. 697.

[4] *Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628, at p. 634; and see *North Stafford Steel, Iron & Coal Co. (Burslem), Ltd.* v. *Ward* (1868), L. R. 3 Exch. 172, at p. 177.

[5] *Hare* v. *Horten* (1833), 5 B. & Ad. 715.

[6] *Aspdin* v. *Austin* (1844), 5 Q. B. 671.

[7] *Stephens* v. *Junior Army & Navy Stores*, [1914] 2 Ch. 516; cf. *Mills* v. *United Counties Bank*, [1912] 1 Ch. 231.

[8] *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, at pp. 271, 272; *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488.

[9] *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319; *Mackay* v. *Dick* (1881), 6 App. Cas. 251, at p. 263.

[10] See *Churchward* v. *R.* (1865), 6 B. & S. 807, at p. 841.

[11] *Lowe* v. *Dorling*, [1906] 2 K. B. 772, at pp. 784, 785.

Expressio unius in regard to Statutes

These principles also apply to statutes [1] and to rules made under the authority of statute.[2] An express statement that certain statutes are repealed shows that others not mentioned are not repealed.[3] Where a statute made occupiers of "land" and other hereditaments, including "coal mines," liable to poor rate, it was held that the mention of coal mines showed that Parliament was using "land" in a sense which did not include mines, and consequently occupiers of mines other than coal mines were not liable.[4]

The application of these principles to statutes must be treated with caution. A saving clause is not intended to give any right but merely to prevent the statute from interfering with existing rights.[5] Exemptions, *e.g.*, are often expressly made *ex abundanti cautela*.[6] An express exemption means that the person named is exempt; it is not to be construed as an implied provision that no others are,[7] and a partial remedy or provision for particular cases enacted by a statute when there is already in existence another Act which gives a complete remedy or provides for all cases does not necessarily alter the existing law or declare it to have been other than what it was.[8] Where rights and powers are given by statute, though they exist already, the new provisions may be interpreted as defining and limiting the previous rights and powers.[9]

Misdescriptions

A person or thing may be designated by name or description or both. Where a description is given which contains several particulars, and there is a subject-matter to which they all apply, there is no misdescription and that subject-matter alone is designated.[10] Difficulty arises where there are several parts and one or more is erroneous. There may be a single description which does not fit anyone or anything, but that is not usual. Where there is a general

[1] *Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628.

[2] *Re a Solicitor*, [1944] K. B. 427, *per* Lord CALDECOTE, C.J., at p. 431.

[3] *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at p. 965.

[4] *Lead Smelting Co.* v. *Richardson* (1762), 3 BURR. 1341; cf. *Thursby* v. *Briercliffe-with-Extwistle* (*Churchwardens, etc.*), [1895] A. C. 32.

[5] *Re Thompson, Bedford* v. *Teal* (1890), 45 Ch. D. 161.

[6] *Newcastle* (*Duke*) v. *Morris* (1870), L. R. 4 H. L. 661, at p. 671; *West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] A. C. 647; *McLaughlin* v. *Westgarth* (1906), 75 L. J. (P. C.) 117; and see *post*, p. 108, as to provisoes.

[7] *London Corporation* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393.

[8] *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. 419, at p. 437; *Shrewsbury* (*Earl*) v. *Scott* (1860), 6 C. B. (N. S.) 1, 221.

[9] *London Association of Shipowners & Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242.

[10] *Smith* v. *Ridgway* (1866), L. R. 1 Exch. 331, at p. 332.

description followed by a particular description, *e.g.* "All my lands in Xshire in the occupation of Y,"[1] then *prima facie* the latter is restrictive, and only such parts of the thing or things which are covered by the general words and are also covered by the particular ones are intended. On the other hand, if there were no lands in the occupation of Y, the latter part would be not restrictive but a misdescription and consequently rejected. If the description does not fit any one person or thing, but part of it does, then by rejection the description contained in that part will apply.[2] On the other hand, where in a bill of sale the grantee was described as of "Boldock in the County of Hereford," which is a non-existent place, and in an affidavit for registration was described correctly as of "Baldock in the County of Hertford," the Court held that there was a material variation, not being able to hold that it was a case of misspelling.[3]

It is for the Court to determine what part is the true description and what part is not, and for that purpose it is immaterial in what order the words of description appear,[4] and the name is no more potent than any other description.[5] An essential part of a description, however, cannot be rejected.

The principles as to property may be stated thus:

(1) Where there is property which exactly answers the description, that property and nothing else passes.

(2) Where there is no property which answers any part of the description nothing passes.

(3) Where there is property to which some part of the description applies and other part does not then the Court must determine if the part which does apply is a complete definition so that the part which does not apply may be justly regarded as a mistake and rejected as *falsa demonstratio*. It is only in regard to this third class that the doctrine of *falsa demonstratio* applies.[6] "The principle of *falsa demonstratio non nocet* . . . means that if on consideration of the relevant parts of the will, one comes to the conclusion that the testatrix intended to pass something and can determine what that something is, then the fact that she has given it a wrong description will not prevent her will taking effect in regard to that which is wrongly described."[7] This applies also to any conveyance or other document as well as to a will.

[1] *Morrell* v. *Fisher* (1849), 4 Exch. 591, at p. 604; *Re Brocket, Dawes* v. *Miller*, [1908] 1 Ch. 185.

[2] *Cholmondeley* (*Marquis*) v. *Clinton* (*Lord*) (1820), 2 Jac. & W. 1; *Anderson* v. *Berkley*, [1902] 1 Ch. 936.

[3] *Re Morris, Ex parte Webster* (1882), 22 Ch. D. 136.

[4] *Eastwood* v. *Ashton*, [1915] A. C. 900, at pp. 912, 917; *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309.

[5] *Drake* v. *Drake* (1860), 8 H. L. Cas. 172, at p. 179.

[6] *Webber* v. *Stanley* (1864), 16 C. B. (N. S.) 698.

[7] *Re Gifford, Gifford* v. *Seaman*, [1944] Ch. 186, at p. 188.

The same principles apply to persons.[1] "Here is a person fitly named, and there can be no reasonable doubt that she was the person intended. It being conceded that it was the testator's intention that Caroline should have the property, and he having mentioned her by an apt description, I see no ground for holding that, because the words 'my dear wife' are not strictly applicable to her, the intention of the testator should fail".[2]

There are innumerable instances of which the following are examples:

Area. A piece of land was described by reference to a plan drawn to scale and was stated to contain 34 perches. The plan showed that there were only 27 perches. Held that the statement as to 34 perches should be rejected.[3] Where dimensions are an essential part of the description and not an addition to a sufficient description they cannot be rejected.[4]

Tenure. A freehold farm and land at Edgware in the occupation of James Bray. A part of the farm was copyhold. Held that it passed.[5]

User. Freehold hereditament called West Cliff, now used as lodging-houses. Only part so used. The whole hereditament passed.[6]

Name. Where land is clearly identified the use of a wrong name is a mere erroneous additional description,[7] and the description of it being in the wrong parish is immaterial.[8]

Occupation. A mistake as to the occupant will not affect a description otherwise sufficient.[9]

A map drawn in the margin and referred to in the document will be looked at to explain the parcels.[10] A complete unambiguous description prevails over the map [11] though, where the description requires the plan to explain it, the plan will prevail.[12]

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[1] For an example in relation to legacies to societies see *Re Tharp, Longrigg* v. *People's Dispensary for Sick Animals of the Poor, Incorporated*, [1943] 1 All E. R. 257.

[2] *Doe* d. *Gains* v. *Rouse* (1848), 5 C. B. 422, *per* MAULE, J., at p. 427; cf. *Re Smalley, Smalley* v. *Scotton*, [1929] 2 Ch. 112, *per* Lord HANWORTH, M.R., at pp. 116–8.

[3] *Llewellyn* v. *Jersey* (*Earl*) (1843), 11 M. & W. 183; but see *Portman* v. *Mill* (1839), 9 L. J. (Ch.) 161.

[4] *Mellor* v. *Walmesley*, [1905] 2 Ch. 164, at p. 175.

[5] *Re Bright-Smith, Bright-Smith* v. *Bright-Smith* (1886), 31 Ch. D. 314.

[6] *Cunningham* v. *Butler* (1861), 3 Giff. 37.

[7] *Rorke* v. *Errington* (1859), 7 H. L. Cas. 617.

[8] *Lambe* v. *Reaston* (1813), 5 Taunt. 207.

[9] *Wrotesley* v. *Adams* (1559), 1 Plowd. 187, at p. 294; *Hardwick* v. *Hardwick* (1873), L. R. 16 Eq. 168; *Martyr* v. *Lawrence* (1864), 2 De G. J. & Sm. 261.

[10] *Taylor* v. *Parry* (1840), 1 Man. & G. 604, at p. 616.

[11] *Willis* v. *Watney* (1881), 51 L. J. (Ch.) 181; *Reilly* v. *Booth* (1890), 44 Ch. D. 12; cf. *Horne* v. *Struben*, [1902] A. C. 454.

[12] *Eastwood* v. *Ashton*, [1915] A. C. 900.

In every case it is a question of considering the whole description and determining what are the leading words and what are subordinate. If the person or property is indicated with sufficient certainty, then inaccuracies will not prevail.

Amounts Written and in Figures

It is customary in bills and notes to place the amount in figures at the top of the document (in the case of cheques, at the bottom left-hand corner) and in writing in the body of the document. Where there is a discrepancy between words and figures, the words prevail,[1] but the practice of banks was stated to be that in the case of cheques they pay the smaller amount.[2] Where a legacy was stated in the will to be " the sum of one hundred pounds (£500) " it was held that the legacy was £500 on the principle that in a will the latter of two inconsistent provisions prevails. " No doubt there is a *prima facie* rule that where words and figures conflict the words ought to prevail, but no case has been brought to my notice where that rule has been applied otherwise than in the case of commercial documents." [3] In a case of patent ambiguity evidence is not admissible to show that there has been a mistake in the wording.[4] It has not been decided what is the position if the figures are given but there is a blank where the words should be, but probably they would be supplied.[5] Obvious mistakes have been corrected by interpretation. Thus, where a note said " Fifty " in writing but £50 in figures, it was held this meant Fifty pounds,[6] and " twenty-five seventeen shillings and threepence " has been held to mean twenty-five pounds," etc.[7]

Writing and Print

Where a contract is on a printed form filled up in writing and the two are not consistent, more attention is given to the writing because the written words were chosen for the particular occasion, while the printed words were general words for all occasions[8];

[1] Bills of Exchange Act, 1882, s. 9 (2); 2 Halsbury's Statutes 40.

[2] *Per* SWINFEN EADY, L.J., in *Macmillan* v. *London Joint Stock Bank*, [1917] 2 K. B. 439, at p. 448.

[3] *Per* SIMONDS, J., in *Re Hammond, Hammond* v. *Treharne*, [1938] 3 All E. R. 308, at p. 309.

[4] *Saunderson* v. *Piper* (1839), 5 Bing. (N. C.) 425.

[5] *Heeney* v. *Addy*, [1910] 2 I. R. 688; but see *Garrard* v. *Lewis* (1882), 10 Q. B. D. 30, at pp. 32–5.

[6] *R.* v. *Elliot* (1777), 1 Leach, 175.

[7] *Phipps* v. *Tanner* (1833), 5 C. & P. 488.

[8] *Robertson* v. *French* (1803), 4 East, 130, at p. 136; *Gumm* v. *Tyrie* (1864), 4 B. & S. 680, at pp. 707, 713; *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, at p. 353; *Sassoon (M. A.) & Sons, Ltd.* v. *International Banking Corporation*, [1927] A. C. 711; but see *Manchester Ship Canal Co.* v. *Horlock*, [1914] 1 Ch. 453, at p. 463; (on appeal), [1914] 2 Ch. 199.

and the Court, though it cannot allow extrinsic evidence, may look at the original document.[1] This rule has been applied in the case of insurances,[2] but with regard to charter-parties it has been held that neither has any greater effect than the other.[3] A printed clause in a policy which is inconsistent with the object of the insurance is disregarded.[4] In the case of a will, the original was looked at to explain a blank and it appeared that the will was on a printed form and the blank was left by the printer for any intending testator to fill up and was not a blank designedly left by the testatrix.[5]

Irreconcilable Provisions

It is an established principle that an instrument of any kind shall be so construed that every clause shall have its effect.[6] It is, however, possible that clauses or provisions are irreconcilable and cannot stand together.[7] Such a construction is avoided if possible, and there are many cases where the Court has with some difficulty and with great ingenuity managed to reconcile the apparently irreconcilable. The principle has been stated in relation to a will as follows: " It is a fundamental rule in the interpretation of wills that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled, and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected." [8] It frequently happens that two such provisions can be fitted together by treating one as a general provision and the other as an exception to it.[9] So also where an absolute gift by will is followed by a direction, inconsistent with the gift being absolute, the direction may be construed as a condition controlling the gift

[1] *Strickland* v. *Maxwell* (1834), 2 Cr. & M. 539.

[2] *Alsager* v. *St. Katharine's Dock* (1845), 14 M. & W. 794, at p. 798; *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K. B. 376.

[3] *Baumwoll Manufactur Von Scheibler* v. *Gilchrest and Furness*, [1891] 2 Q. B. 310, at p. 317; (on appeal), [1892] 1 Q. B. 253; and in H. L. *sub nom. Baumwoll, &c.* v. *Furness*, [1893] A. C. 8.

[4] *Hydarnes S.S. Co.* v. *Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q. B. 500; *Marten* v. *Vestey*, [1920] A. C. 307; *Cunard S.S. Co.* v. *Marten*, [1903] 2 K. B. 511.

[5] *Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390, at pp. 393, 394; and see *Houston* v. *Burns*, [1918] A. C. 337; *Oppenheim* v. *Henry* (1853), 10 Hare, 441; *Re Battie-Wrightson, Cecil* v. *Battie-Wrightson*, [1920] 2 Ch. 330; *Re Messenger's Estate, Chaplin* v. *Ruane*, [1937] 1 All E. R. 355.

[6] *Shelley's Case* (1581), 1 Co. Rep. 93b; *Butler* v. *Duncomb* (1718), 1 P. Wms. 448, at p. 457.

[7] *Ocean S.S. Co.* v. *Queensland State Wheat Board*, [1941] 1 K. B. 402.

[8] *Per cur.* in *Re Potter's Will Trusts*, [1944] Ch. 70, at p. 77.

[9] See *Sutcliffe* v. *Minister of Health*, [1942] 2 K. B. 86, where s. 13 (4) of the Widows, Orphans & Old Age Contributory Pensions Act, 1925, was held to be general and s. 15 (7) a particular provision, taking effect by way of exception. See also *Macmillan & Co., Ltd.* v. *Rees*, [1946] 1 All E. R. 675.

when followed by a gift over on failure to comply with it, but not when the consequences of failure are not provided for.[1] A gift of the same thing to two different persons may be effectuated by making them joint tenants or giving one a life interest and the other a succession if there are any words that may seem to justify it.

With regard to statutes, the inconsistency may be as to provisions in the same Act or more usually as between provisions in two different Acts. There does not appear to be any decision that two provisions in the same statute are irreconcilable, and it is said that in such a case the later prevails,[2] though, as was pointed out in *Castrique* v. *Page*,[3] the Royal Assent is given to the whole at once so that neither is earlier nor later than the other, but this comment would also apply to deeds and wills, where the rules applicable have been acted on for centuries. Where two provisions in two different Acts are inconsistent so that they cannot stand together, the earlier is impliedly repealed,[4] but the Court must do its best to find a reasonable construction which does not involve a repeal by implication.[5]

In the case of deeds, wills or other instruments, it is not unknown that irreconcilable provisions are inadvertently inserted. The Court will endeavour to find a construction which will harmonise them,[6] but if it is impossible then, as a matter of construction, the Court may be able to say which provision is to be rejected; for example, one may be calculated to effectuate the intention shown by the instrument and the other not. This is the case both as to deeds[7] and as to wills.[8] If, however, there is nothing to indicate which is to be accepted, then in the case of deeds the earlier provision is maintained,[9] and in the case of wills the latter prevails.[10]

Argument of Inconvenience

The argument of inconvenience is often misapplied. It does not enable anyone to argue that a particular meaning is not to be placed on the instrument because inconvenient consequences follow. It is open only when there are two constructions fairly possible and the

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[1] *Re Fry, Reynolds* v. *Denne*, [1945] Ch. 348, *per* VAISEY, J., at p. 354.

[2] *Wood* v. *Riley* (1867), L. R. 3 C. P. 26, at p. 27.

[3] (1853), 13 C. B. 458, at p. 461.

[4] *Re Cannings, Ltd., and Middlesex County Council*, [1907] 1 K. B. 51, at p. 58; *Ellen Street Estates, Ltd.* v. *Minister of Health*, [1934] 1 K. B. 590.

[5] *Re Chance*, [1936] Ch. 266, at p. 270; *Re Berrey, Lewis* v. *Berrey*, [1936] Ch. 274, at p. 279.

[6] *Bush* v. *Watkins* (1851), 14 Beav. 425, at p. 432.

[7] *Walker* v. *Giles* (1848), 6 C. B. 662, at p. 702; *Doran* v. *Ross* (1789), 1 Ves. 57.

[8] *Morrall* v. *Sutton* (1845), 1 Ph. 533, p. 545; cf. *Re Segelcke, Ziegler* v. *Nicol*, [1906] 2 Ch. 301, at p. 305.

[9] *Forbes* v. *Git*, [1922] 1 A. C. 256, at p. 259.

[10] *Paramour* v. *Yardley* (1579), 2 Plowd. 539; *Re Hammond, Hammond* v. *Treharne*, [1938] 3 All E. R. 308.

Court has to decide which is the right one.[1] Then the Court will naturally tend to accept that construction which does not result in inconvenience. Though in other cases the fact that the apparent meaning will cause inconvenience may cause the Court to act with caution it cannot enable them to adopt a forced construction.[2] "Arguments *ab inconvenienti* are not in themselves very conclusive as to the meaning of an Act of Parliament,"[3] but they do have a distinct use. Thus, where an appellant from justices was required to make his complaint to Quarter Sessions within four months, it was held that complaint meant notice of appeal and not appearance for hearing at Quarter Sessions. The latter construction might, owing to the dates of holding Quarter Sessions, give the appellant little or no time to appeal or might even prevent him from appealing if no sitting was held.[4] Where a local authority may serve a notice requiring work to be done within the time specified in the notice, the time is not any time at the arbitrary will of the authority but must be a reasonable time.[5]

Argument of Injustice or Absurdity

The argument of injustice or absurdity is similar to the argument of inconvenience, and may at times be almost indistinguishable.[6] Here again care must be taken to use the argument in the right way as a means of selecting one meaning as against another, and not as colouring the words of the instrument or statute.[7] Thus Lord THANKERTON, after pointing out that s. 15 of the Mines (Working Facilities and Support) Act, 1923,[8] provides for a complete and integrated code, continued: "It is not for the Court to consider whether any individual provision of the Code does justice to the one party interested or the other. The duty of the Court is to construe

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[1] *Re Alma Spinning Co., Bottomley's Case* (1880), 16 Ch. D. 681, at p. 686; *Vacher & Sons, Ltd.* v. *London Society of Compositors*, [1913] A. C. 107, *per* Lord MOULTON, at p. 130; *Re Wakeman*, [1945] Ch. 177, at p. 181.

[2] *Hall* v. *Franklin* (1838), 3 M. & W. 259, at p. 275; *Hutton* v. *Harper* (1876), 1 App. Cas. 464, at p. 474; *Wentworth* v. *Humphrey* (1886), 11 App. Cas. 619, at p. 626; *Reid* v. *Reid* (1886), 31 Ch. D. 402, at p. 407.

[3] *Per* Lord PORTER in *King Features Syndicate, Ltd.* v. *Kleeman, Ltd.*, [1941] A. C. 417, at p. 451.

[4] *R.* v. *Essex Justices* (1864), 34 L. J. (M. C.) 41.

[5] *Bristol Corporation* v. *Sinnott*, [1918] 1 Ch. 62.

[6] *Aston Tube Works* v. *Dumbell*, [1904] 1 K. B. 535, where WILLS, J., at p. 544, commencing with inconvenience, brings in injustice; *Fletcher* v. *Ilkeston Corporation* (1931), 96 J. P. 7, *per* SLESSER, L.J., at p. 12.

[7] See *Abley* v. *Dale* (1851), 11 C. B. 378, at p. 391; *R.* v. *Monck* (1877), 2 Q. B. D. 544, at pp. 554, 555; *De Vesci* (*Viscountess*) v. *O'Connell*, [1908] A. C. 298, at p. 307; cf. *Fagot* v. *Gaches*, [1943] K. B. 10, at p. 12; (GODDARD, L.J.); *Herbert* (*Lord*) v. *Commissioners of Inland Revenue*, [1943] K. B. 288, at pp. 290, 291.

[8] 14 Halsbury's Statutes 389.

the language used." [1] But inconvenience, injustice or absurdity may fairly be used as an argument against putting a wide construction upon purely general words,[2] or implying a provision.[3] A statute which enabled the Poulters' Company to fine all poulterers within a specified area who refused to join the Company was held to apply only to such poulterers as were liverymen of the City because only such persons were qualified to become members. A man cannot refuse to join a company to which he is not entitled to belong.[4] The Public Authorities Protection Act, 1893,[5] provided that a judgment for a public authority defendant should carry costs as between solicitor and client. This might mean in every case or in such cases as the Court should direct costs, as the judge has power for cause to deprive a successful defendant of his costs. It was held that the provision meant that when costs were awarded to a defendant they should be as between solicitor and client.[6] A provision against the use of furnaces in such a manner that they did not consume their smoke as far as possible was held not to mean as far as physically possible without regard to the business, but as far as possible consistent with the proper carrying on of the business on the premises. The Act did not profess to prohibit or control the business.[7] Examples of absurdity are not frequent.[8] It would obviously be absurd if elaborate provisions were held to accomplish little or nothing, and such a construction would not be adopted if another was available which did give them force and effect. A provision that a local authority which "supplies water" in a district shall have power to lay water mains would be absurd if it

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[1] *L.N.E.R. Co.* v. *B.A. Collieries, Ltd.*, [1945] A. C. 143, at p. 166; and see *per* Lord MACMILLAN, at p. 178.

[2] *In re Brockelbank* (1889), 23 Q. B. D. 461, at pp. 462–463. *Woolfall and Rimmer, Ltd.* v. *Moyle*, [1942] 1 K. B. 66, at p. 73, where GREENE, M.R., said "A policy of this kind is not to be approached with the idea that a large part of the benefit of the insurance which any employers would obviously wish to get, and which is at the outset given in wide terms is to be eliminated by a 'condition' tucked away at the end of the policy in the context in which this condition is found, for, be it observed, all the other conditions relate to matters of comparatively minor importance."

[3] *L.N.E.R. Co.* v. *B.A. Colleries, Ltd., supra, per* Lord WRIGHT, at p. 188.

[4] *Poulters' Company* v. *Phillips* (1840), 6 Bing. (N. C.) 314.

[5] 13 Halsbury's Statutes 455.

[6] *Bostock* v. *Ramsey U.D.C.*, [1900] 2 Q. B. 616.

[7] *Cooper* v. *Woolley* (1867), L. R. 2 Exch. 88. Recent cases are: *Port of London Authority* v. *Essex Rivers Catchment Board*, [1944] K. B. 512, *per* HUMPHREY, J., at p. 518 (the actual decision was reversed on appeal, [1945] K. B. 101); *Re Pascoe*, [1944] Ch. 219, *per* Lord GREENE, M.R., at p. 244; *Oxley* v. *Regional Properties, Ltd.*, [1944] 2 All E. R. 510, *per* Lord GREENE, M.R., at p. 512; *Re Berkeley (Earl)*, *Borrer* v. *Berkeley (No. 2)*, [1945] Ch. 107, *per* Lord GREENE, M.R., at p. 112; *Perrins* v. *Smith*, [1946] K. B. 90, at pp. 92–3.

[8] See *A.-G.* v. *Beauchamp*, [1920] 1 K. B. 650, *per* ROWLATT, J., at pp. 656, 657.

meant that the authority must supply water before it can lawfully provide the means for supplying it. The words must mean something such as "undertakes to supply water." [1] Again, in construing articles of association a construction which would lead to absurdity is not to be adopted if there is any other interpretation which is fairly permissible. "It is of course quite permissible to 'deem' a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to 'deem' that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind, if applied to such a subject matter as Art. 93, amounts to a complete absurdity." [2] Similarly, a statute does not *prima facie* assume that a person will commit a crime. Where the words were "if he is in fact able to do so by any means whatsoever," they did not include the case where he was able to do so only if he committed a crime. "The Att.-Gen. . . . did not suggest that even the wide words 'by any means whatsoever' were wide enough to cover a case in which a man could only be said to be able to secure the object aimed at by the commission of a crime. That this concession was rightly made we do not doubt. We are of the further opinion that no one is brought within the section if he is only able to secure his object in the sense that he might obtain a temporary and precarious hold on income or assets . . . by resort to unlawful means. We include . . . torts, breaches of contract and breaches of trust, with the reservation that whenever acquiescence or condonation . . . can put the wrongdoer in as good a position as if his conduct had been lawful from the first, the unlawful nature of the means employed will not prelude a finding . . . if there is evidence . . . that the acquiescence or condonation will not be withheld." [3]

Presumption against Injustice

Where the words of a statute are plain but work apparent injustice, the Courts will give effect to them, but will not give them any further effect than is necessary to carry out the purpose of the legislature,[4] as the legislature is not presumed to do injustice and, if that can properly be avoided by construction, the Courts will

[1] *Jones* v. *Conway and Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch. 603; and see *per* MACKINNON, L.J., in *Forestal Land, Timber and Railways Co.* v. *Rickards*, [1941] 1 K. B. 225, at p. 250; (on appeal) *sub nom. Rickards* v. *Forestal Land, Timber and Railways Co.*, [1942] A. C. 50.

[2] *Robert Batcheller & Sons, Ltd.* v. *Batcheller*, [1945] Ch. 169, *per* ROMER, J., at p. 176, and see also p. 177.

[3] *Comnrs. of Inland Revenue* v. *L. B. (Holdings), Ltd.*, [1944] 1 All E. R. 308, *per* DU PARCQ, L.J., at p. 315; reversed, [1946] 1 All E. R. 598.

[4] *Tozer* v. *Viola*, [1918] 1 Ch. 75, at p. 86.

so construe the statute, but not so as to amend it.[1] The consequences in any particular case do not affect statutes. They are, at least public general statutes are, passed for general public purposes, and have no regard for other than an ordinary and usual state of affairs, unless specially dealt with.[2] Thus an Act has been held to authorise a public nuisance.[3] But regard is had to the stated or to the obvious purpose. Thus a provision disqualifying a person who has been convicted of felony from holding a licence was held not to be penal but one for the protection of the public.[4] And in a recent case the Court preferred an interpretation which wrought injustice to one which led to chaos.[5]

Taking Advantage of One's own Wrong

A stipulation that a contract shall be void in a specified event is not to be construed as giving one party the right to terminate the contract by contriving to bring that event to pass.[6] When school fees were due, a parent did not cause his child to attend school by sending him without the school fees.[7] A trustee liable to imprisonment for disobeying an order to pay over money " in his possession " is not able to avoid the consequences by taking the precaution of spending it beforehand. The words are capable of meaning " are or have been in his possession." [8] A bidder at an auction who failed to pay the duty, then due from him, on pain of having his bid made null and void could not avoid his contract by simply neglecting to pay the duty.[9] But although the Court will not so construe an instrument, it is possible to secure that result by appropriate words. A common instance is the clause exempting railway companies from liability for negligence. With regard to directors, provisions exempting them from liability for negligence have been made void by the Companies Act, 1929, s. 152.[10]

Presumption against Grantor

In the case of instruments *inter partes* it may appear by express statement or by construction that the words are those of both or of either, and in that case the presumption against a grantor would not

[1] *Smurthwaite* v. *Wilkins* (1862), 11 C. B. (N. S.) 842, at p. 848; *R.* v. *Tonbridge Overseers* (1884), 13 Q. B. D. 339, at. p. 342; cf. *Gollin* v. *Commissioners of Inland Revenue*, [1943] 1 All E. R. 346, at p. 348.

[2] *Dixon* v. *Harrison* (1669), Vaugh. 36, 37.

[3] *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418, and see the other instances given on p. 8, *ante*.

[4] *R.* v. *Vine* (1875), L. R. 10 Q. B. 195.

[5] *Worthing Corporation* v. *Southern Rail. Co.*, [1942] Ch. 437.

[6] *New Zealand Shipping Co., Ltd.* v. *Société des Ateliers et Chantiers de France*, [1919] A. C. 1.

[7] *London School Board* v. *Wright* (1884), 12 Q. B. D. 578.

[8] *Middleton* v. *Chichester* (1871), 6 Ch. App. 152.

[9] *Malins* v. *Freeman* (1838), 4 Bing. (N. C.) 395.

[10] 2 Halsbury's Statutes 873.

apply. In the case of a deed poll or similar instrument there can only be one person to whom the words of the deed can be imputed. The maxim *verba fortius accipiuntur contra proferentem* only applies where there is more than one meaning, and after all proper methods of interpretation have been used it is still uncertain which is the proper meaning,[1] and therefore it gives way, for example, to the principle *res magis valeat quam pereat*.[2] When a grant is made for valuable consideration, the words are taken against the grantor.[3] Thus an exception will be construed in favour of the grantee [4] and a reservation in favour of the grantor, who is for that purpose in the position of a grantee.[5] JESSEL, M.R., thought the rule was obsolete,[6] but numerous cases since have shown that it still operates. Where a person prepares and presents a document to another for signature, *e.g.* a proposal form, the person who prepares it is in the position of the grantor [7] and it may make a difference whether the document is prepared on a form insisted on by one party or whether the wording has been settled by negotiation.[8] Where a person is a beneficiary under a settlement made by him the rule applies as if the settlement had been made by a stranger.[9] A guarantee is construed against the party executing it[10]; conditions of sale against the vendor[11]; covenants against the covenantor,[12] such as covenants for title[13] or in a lease.[14] It has been said that forfeiture clauses are to be construed strictly, but they must be construed according to the language used.[15] Again, though it used to be said that there was a presumption against construing a covenant for renewal as giving a perpetual right of renewal, the true rule is that it depended

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[1] *Lindus* v. *Melrose* (1858), 3 H. & N. 177.

[2] *Rodger* v. *Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393, at p. 406.

[3] *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399, at pp. 404, 405; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, at p. 149; *Gluckstein* v. *Barnes*, [1900] A. C. 240, at p. 250.

[4] *Savill* v. *Bethell*, [1902] 2 Ch. 523, at p. 537.

[5] *South Eastern Rail. Co.* v. *Associated Portland Cement Manufacturers*, 1900, *Ltd.*, [1910] 1 Ch. 12, 24.

[6] *Taylor* v. *St. Helens Corporation* (1877), 6 Ch. D. 264, at p. 270.

[7] *Fowkes* v. *Manchester and London Assurance Association* (1863), 3 B. & S. 917, at p. 929; and see A/S *Ocean* v. *Black Sea Baltic General Insurance Co.* (1935), 51 Lloyd L. R. 305, at pp. 307, 310.

[8] Cf. *Thomson* v. *Weems* (1884), 9 App. Cas. 671, at p. 682, with *Condogianis* v. *Guardian Assurance Co.*, [1921] A. C. 125, at p. 131.

[9] *Vincent* v. *Spicer* (1856), 22 Beav. 380, at p. 383.

[10] *Hargreave* v. *Smee* (1829), 6 Bing. 244.

[11] *Seaton* v. *Mapp* (1846), 2 Coll. 556.

[12] *Warde* v. *Warde* (1852), 16 Beav. 103, at p. 105.

[13] *Barton* v. *Fitzgerald* (1812), 15 East 530, at p. 546.

[14] *Webb* v. *Plummer* (1819), 2 B. & Ald. 746, at p. 751.

[15] *Re Furness, Wilson* v. *Kenmare*, [1944] 1 All E. R. 575, *per* Lord GREENE, M.R., at p. 577.

on the language used, but that equivocal expressions would not be construed as giving a perpetual right of renewal.[1]

Where a contract can be fulfilled in several ways, that way is taken in an action for breach which is least profitable to the complaining party.[2] The chief operation of the rule in regard to private documents appears to be in connection with disputes between the parties as to the construction.

Presumption in Favour of Crown in Crown Grants

To the rule that in such cases the grant is construed in favour of the grantee there is the exception that in the case of a grant by the Crown it is construed most strictly in favour of the Crown, for the reason that the Crown's prerogative rights and privileges, having been conferred for the public use and advantage, ought not to be taken away by any grant unless it is clear.[3] This excludes the application of the maxims *Expressum facit cessare tacitum* and *Expressio unius est exclusio alterius*.[4] Prerogative rights will only pass if expressly mentioned. Thus, where franchises were granted generally the words did not pass treasure trove[5] and a grant of mines would not carry gold or silver mines.[6] Where a grant would need some further act or grant by the Crown in order that it should be effective, the further act or grant cannot be implied, *e.g.* where the Crown granted lands to an alien, which he could not hold at common law unless he was a denizen, the grant did not make him a denizen by implication.[7] Although the principle is so stated, there has always been a rule that in certain cases, at least, it does not apply. Thus COKE has said that where the intention is clear a liberal interpretation should be given to enable the grant to take effect, for it cannot be the King's intent to make a void grant.[8] It has been said that the presumption does not apply when the grant is expressed to be *ex mero motu et certa scientia*, but this has been denied.[9] In any case it is only a presumption and does not overrule the ordinary methods

[1] *Green* v. *Palmer*, [1944] Ch. 328, *per* UTHWATT, J., at p. 330.

[2] *Cockburn* v. *Alexander* (1848), 6 C. B. 791, at p. 814.

[3] *The Rebeckah* (1799), 1 Ch. Rob. 227, at p. 230; *Dixon* v. *London Small Arms Co.* (1876), 1 Q. B. D. 384, at p. 396; (on appeal) (1876), 1 App. Cas. 632; *Viscountess Rhondda's Claim*, [1922] 2 A. C. 339; *Hudson's Bay Co.* v. *A.-G. for Canada*, [1929] A. C. 285.

[4] *Eastern Archipelago Co.* v. *R.* (1853), 2 E. & B. 856.

[5] *A.-G.* v. *British Museum Trustees*, [1903] 2 Ch. 598.

[6] *Case of Mines, R.* v. *Northumberland* (*Earl*) (1567), 1 Plowd. 310, at p. 330; and see *A.-G. of British Columbia* v. *A.-G. of Canada* (1889), 14 App. Cas. 295.

[7] *Knight's Case* (1588), 5 Co. Rep. 54b.

[8] *St. Saviour's, Southwark* (*Churchwardens*) *Case* (1613), 10 Co. Rep. 66b, at 67b.

[9] *R.* v. *Capper* (1817), 5 Price. 217, at p. 260.

of ascertaining what is included in the grant.[1] The meaning of words used in a Crown grant is ascertained in the same way as that of any other document.[2] Thus, the operative part, if clear, will not be controlled by the recitals.[3]

The cases where the ordinary rule applies in the same way as in private deeds are said to be (1) where the grant is expressed to be made *ex speciali gratia, certa scientia et mero motu regis*,[4] and (2) where it should be done for the honour of the King.[5] One instance under the second head is where the grant is for valuable consideration.[6] Where there are two constructions, both of which are good, then that one more favourable to the Crown is preferred.[7] Licences and passports to alien enemies in war time have been held to be liberally construed.[8] There does not appear to have been any occasion in recent years for the Courts to consider the principle of construing such licences, safe conducts, etc.

In the case of patents the tendency has changed from strict interpretation to beneficial interpretation for the patentee,[9] and then to one leaning neither way,[10] and latterly tending to strictness.[11] But the matter of patents is so technical that these different views may possibly coexist as to different patents.

Res magis valeat quam pereat

A choice between more than one construction may be determined in favour of one by the consideration that such construction will carry out the intention or be valid, whereas the other would tend to defeat the intention or would render the instrument invalid. This is usually referred to by the maxim *Res magis valeat quam pereat*, which appears in Bracton.[12] It applies only when the various constructions are

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[1] *A.-G.* v. *Ewelme Hospital* (1853), 17 Beav. 366, at p. 386.

[2] *Lord* v. *Sydney Commissioners* (1859), 12 Moo. P. C. C. 473.

[3] *Legat's Case* (1612), 10 Co. Rep. 108b.

[4] *Alton Woods' Case*, *A.-G.* v. *Bushopp* (1600), 1 Co. Rep. 40b); but see *R.* v. *Capper*, *ante*, p. 91.

[5] *Molyn's Case* (1598), 6 Co. Rep. 5b.

[6] *Bewley's Case* (1611), 9 Co. Rep. 130b; *St. Saviour's, Southwark (Churchwardens) Case* (1613), 10 Co. Rep. 66b, at 67b.

[7] *Rutland's (Earl) Case* (1608), 8 Co. Rep. 55a.

[8] *Flindt* v. *Scott* (1814), 5 Taunt. 674; *Vaughan* v. *Lemcke* (1825), 7 Dow. & Ry. K. B. 236.

[9] *Feather* v. *R.* (1865), 6 B. & S. 257, at pp. 283, 284.

[10] *Simpson* v. *Holliday* (1866), L. R. 1 H. L. 315; *Needham and Kite* v. *Johnson & Co.* (1884), 1 R. P. C. 49, at p. 58.

[11] *Tubes, Ltd.* v. *Perfecta Seamless Steel Tube Co.* (1902), 20 R. P. C. 77, at p. 95; and see *Consolidated Car Heating Co.* v. *Came*, [1903] A. C. 509.

[12] *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, at p. 160; *Roe* d. *Wilkinson* v. *Tranmarr* (1757), Willes 682, at p. 684; *Pugh* v. *Leeds (Duke)* (1777), 2 Cowp. 714; *Mills* v. *Dunham*, [1891] 1 Ch. 576, at p. 590; *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch. 37, pp. 46, 52, 53, affirmed, [1910] A. C. 381.

possible, for the Court will not add words to raise a favourable construction so as to make an instrument for the parties.[1] The principle applies where a deed is incapable of operating one way but can operate in another way[2]; but where the intention of the party is clearly against a particular construction, the circumstance that that construction will validate the deed is not a reason for adopting it.[3] thus a voluntary settlement intended to operate as a transfer will not be construed as a declaration of trust if the transfer is not effected.[4]

The maxim *Res magis valeat quam pereat* applies to all instruments, such as wills,[5] patents,[6] and pleadings under the old system.[7] Where a grant can validly take effect in more than one way, the grantee may elect which way.[8]

Where a person uses expressions that are ambiguous, the interpretation may depend on the onus. Thus a person who makes a communication to another in ambiguous terms may be bound by the meaning *bona fide* placed on it by the recipient,[9] or a vendor who makes special stipulations may not be able to complain if the purchaser places his own interpretation upon an ambiguous stipulation,[10] and where the terms of a contract are too ambiguous for the Court to interpret, judgment may go against the party who should have made it clear,[11] since *verba fortius accipiuntur contra proferentem.*[12]

The same considerations do not apply to *statutes*, for the reason that they make rules of law and are not subject to them. It is presumed that statutes do not go beyond the limits recognised by the common consent of nations,[13] but, as Parliament is legislatively omnipotent, this presumption must give way to clear words.[14] Similarly statutes are interpreted, if possible, so as to be consistent with international conventions and public and private international

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[1] *Mills* v. *Dunham*, [1891] 1 Ch. 576, at p. 580.

[2] *Goodtitle* d. *Edwards* v. *Bailey* (1777), 2 Cowp. 597, at p. 600; *Shep. Touch.* 82.

[3] *Daw* v. *Newborough* (1716), 1 Com. 242.

[4] *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, at p. 274; *Macedo* v. *Stroud*, [1922] 2 A. C. 330, at p. 338.

[5] *Thellusson* v. *Woodford* (1799), 4 Ves. 227, at p. 312; on appeal (1805), 11 Ves. 112; *Whicker* v. *Hume* (1858), 7 H. L. Cas. 124, at p. 154; *Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532, at p. 548; *Re Stamford and Warrington* (*Earl*), *Payne* v. *Grey*, [1912] 1 Ch. 343, at p. 365.

[6] *Russell* v. *Cowley* (1835), 1 Cr. M. & R. 864, at p. 876.

[7] *Peter* v. *Daniel* (1848), 5 C. B. 568, at pp. 579, 580; *Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624, at p. 678.

[8] *Shep. Touch.* 83; *Heyward's Case* (1595), 2 Co. Rep. 35a; cf. *Savill Brothers* v. *Bethell*, [1902] 2 Ch. 523.

[9] *Miles* v. *Haslehurst & Co.* (1906), 23 T. L. R. 142.

[10] *Seaton* v. *Mapp* (1846), 2 Coll. 556.

[11] *Heugh* v. *Escombe* (1861), 4 L. T. 517.

[12] *Edis* v. *Bury* (1827), 6 B. & C. 433; see also *ante*, p. 89.

[13] *Bloxam* v. *Favre* (1883), 8 P. D. 101; (on appeal) (1884), 9 P. D. 130.

[14] *Mortensen* v. *Peters* (1906), 8 F. (Ct. of Sess.) 93, at p. 103.

law,[1] but if the statute is clear then it prevails though inconsistent with international law.[2] *Regulations* and other provisions made under statutory authority, when not having the same force as the statute, are subject to the rule that an interpretation favourable to validity will, if possible, be preferred to one that would render them *ultra vires* and therefore invalid. Thus, if there is an ambiguity and on one construction a Minister has made an order in excess of his powers and on the other he has not, then the Court will give it the meaning which is consistent with a proper exercise of his powers.[3] Further, they will also be construed widely if there are two constructions, and, while the strict literal construction leads to an illogical result, the wider will effect the declared purpose.[4]

(*d*) Spirit of Interpretation

Plain Words to be given Plain Meaning

The Court sets out with the intention if possible of giving the instrument effect in accordance with its expressed intention. It is assumed that the transaction contained in the will, deed or other document is to be carried out and that the transaction does not go further. In the same way, it is assumed that a statute designed to alter the law in a stated particular does not intend to alter the law in any other respect. But the principle here under discussion, like all other principles of the same kind, does not enable the Court to ignore plain words, to give them a meaning which they will not bear, or to construe plain words in other than their plain meaning.[5] The principles are the same at law and in equity.[6]

Plain Words not affected by Strict or Liberal Construction

It is immaterial whether the Court is said to place a strict or liberal construction upon a document where the words are plain and admit only of one meaning. In such a case the proper meaning must

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[1] *Re Martin, Loustalan* v. *Loustalan*, [1900] P. 211, at p. 233 ; and see *Re Queensland Mercantile and Agency Co., Ex parte Australasian Investment Co., Ex parte Union Bank of Australia*, [1892] 1 Ch. 219, at p. 229.

[2] *R.* v. *Anderson* (1868), L. R. 1 C. C. R. 161 ; *Niboyet* v. *Niboyet* (1878), 4 P. D. 1 ; *Croft* v. *Dunphy*, [1933] A. C. 156, at p. 164.

[3] *Hulland* v. *Wm. Saunders & Son*, [1945] K. B. 78.

[4] See *e.g. Potts* (or *Riddell*) v. *Reid*, [1943] A. C. 1, at p. 16.

[5] *Re Benn, Benn* v. *Benn* (1885), 29 Ch. D. 839, at p. 847 ; *Re Powell, Bodvel-Roberts* v. *Poole*, [1918] 1 Ch. 407, in which case a man left the residue of his estate upon the trusts of a settlement under which he was the sole person entitled ; *Crampton* v. *Wise* (1888), 58 L. T. 718, in which case a man left his property to his relations " hereafter named " and never named any.

[6] *Scott* v. *Liverpool Corporation* (1858), 3 De G. & J. 334, at p. 360 ; *Re Terry and White's Contract*, (1886), 32 Ch. D. 14, at p. 28.

be placed on the words whatever the effect,[1] *e.g.* to cause a public nuisance,[2] or to enable a taxpayer to escape for purely technical reasons,[3] or to work an obvious injustice.[4] It is only where there are at least two possible constructions that the matter of strict or liberal construction can arise.[5] " I do not like the expression ' benevolent interpretation.' I do not believe in it. The question is whether a given construction is the true construction; but of course if any patent is capable of more constructions than one, the general rule would be applied that you would put upon it that construction which makes it a valid patent, rather than a construction which makes it invalid. There is no particular benevolence in that. It is a general principle of construction applicable to all documents." [6] So, too, where there is doubt, regard may be had to the mischief to be cured as well as to the means of cure provided.[7] But the Court will not indulge in conjecture as to purposes not stated by the words used, or as to what would have been done in a case which had apparently escaped attention,[8] *e.g.* the fact that some people cannot write did not enable the Court so to construe Lord Tenterden's Act [9] as to hold that an acknowledgment could be signed by an agent.[10]

The Sea Regulations are issued for the use of seafaring men and must be construed in the light of that circumstance, but mariners are expected to read them in a seamanlike manner.[11]

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[1] *Dixon* v. *Harrison* (1669), Vaugh. 36, 37; *London Brick Co.* v. *Robinson*, [1943] A. C. 341, at p. 348.

[2] *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418.

[3] *R.* v. *Southampton Income Tax General Commissioners, Ex parte Singer*, [1917] 1 K. B. 259, at p. 271; cf. *Henriksen* v. *Grafton Hotel, Ltd.*, [1942] 2 K. B. 184, at p. 193.

[4] *Wankie Colliery* v. *Commissioners of Inland Revenue*, [1921] 3 K. B. 344, at p. 355.

[5] In *Wallrock* v. *Equity and Law Life Assurance Society*, [1942] 2 K. B. 82, at p. 85, GREENE, M.R., said, " The difficulty is caused by the words ' taking of possession.' We were invited to say that these words can, by a liberal construction, be regarded as covering the statutory acquisition of the right to receive the rent from the under tenant, but on consideration we have come to the conclusion that this construction is not legitimate. In the absence of a clear context the words ' taking possession ' are suitable only to the case of physical things and are entirely unsuitable to describe the legal operation which takes place under s. 6 " (of the Law of Distress (Amendment) Act, 1908).

[6] *Per* LINDLEY, L.J., in *Needham and Kite* v. *Johnson & Co.* (1884), 1 R. P. C. 49, at p. 58.

[7] *Watkinson* v. *Hollington*, [1944] K. B. 16, *per* GODDARD, L.J., at p. 22; *Collman* v. *Roberts*, [1896] 1 Q. B. 457, at p. 460.

[8] *Lumsden* v. *Inland Revenue Commissioners*, [1914] A. C. 877, at p. 887; *A.-G.* v. *Noyes* (1881), 8 Q. B. D. 125.

[9] 3 Halsbury's Statutes 584; 10 *ibid.* 439.

[10] *Hyde* v. *Johnson* (1836), 2 Bing (N. C.) 776, at p. 780.

[11] *The Dunelm* (1884), 9 P.D. 164, at p. 171.

Words capable of Extended or Restricted Meaning

Where, therefore, words are capable of several meanings, the Court may apply a test which will extend or restrict the meaning. Thus a will is benevolently construed, and a testator who has drafted his own will will be taken to have used technical words in a popular sense,[1] but the Court will have regard to the skill used in the drafting.[2] It is assumed that a man did not intend to die intestate when he has gone through the form of making a will,[3] though in *Re Powell, Bodvel-Roberts* v. *Poole*[4] the testator there succeeded in doing so. But though greater latitude is allowed in the case of wills than in other documents,[5] it is important to adhere to the rules, and latitude cannot be allowed to drift into disregard of the words.[6] A testator cannot make his approval of the words of his intended will conditional upon their having in law the effect he desires. If he executes the will knowing and approving the words used, the Court cannot exclude from probate words therein on the ground that the testator has taken a view of their legal effect which turns out to be mistaken.[7] With regard to other instruments the Court will endeavour to effectuate the transaction, but can only do so if the words enable that to be done.[8]

Powers of Attorney

It has been said that Powers of Attorney should be construed strictly,[9] and that also naked powers should be so construed.[10]

Statutes construed liberally

Subject to the above observations,[11] it is said that the following statutes will be construed liberally:

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[1] *Re Taylor, Taylor* v. *Tweedie*, [1923] 1 Ch. 99, at p. 105.
[2] *Re Dayrell, Hastie* v. *Dayrell*, [1904] 2 Ch. 496, at p. 499.
[3] *Re Harrison, Turner* v. *Hellard* (1885), 30 Ch. D. 390, at p. 393.
[4] *Ante*, p. 94.
[5] *Lewis* v. *Rees* (1856), 3 K. & J. 132, at p. 147.
[6] *Abbott* v. *Middleton, Ricketts* v. *Carpenter* (1858), 7 H. L. Cas. 68, at pp. 113, 114; *Re Nightingale, Bowden* v. *Griffiths*, [1909] 1 Ch. 385, at p. 388.
[7] *In the Estate of Beech, Beech* v. *Public Trustee*, [1923] P. 46.
[8] *Parkhurst* v. *Smith* (1742), Willes 327, at p. 332; *Langston* v. *Langston* (1834), 2 Cl. & Fin. 194, at p. 243; and see *Josselson* v. *Borst*, [1938] 1 K. B. 723.
[9] *Howard* v. *Baillie* (1796), 2 Hy. Bl. 618, at p. 620; *Bryant, Powis & Bryant* v. *La Banque du Peuple*, [1893] A. C. 170, at p. 177.
[10] *Marlborough* (*Duke*) v. *Godolphin* (*Lord*) (1750), 2 Ves. Sen. 61, at p. 79; *Zouch* v. *Woolston* (1761), 1 Wm. Bl. 281, at p. 283.
[11] See also *ante*, p. 7.

(*a*) Remedial [1] and amending statutes.[2]
(*b*) Explanatory statutes.[3]
(*c*) Statutes for the maintenance of religion, the advancement of learning and the relief of the poor.[4]
(*d*) Directory as distinguished from mandatory or imperative statutes.[5]
(*e*) Statutes in favour of the liberty of the subject.[6]
(*f*) Statutes and Rules for the defence of the realm.[7]

Remedial Statutes

With regard to remedial statutes, the Court endeavours to construe the words so as to give a complete remedy if the words are capable of such a construction.[8] A liberal construction is also said to be given to a saving clause to protect people from the consequence of acts done under a repealed statute.[9] A penal statute may also be remedial.[10] " The purposes of the enactment are, from one aspect, remedial, and from another, penal. It is not surprising, therefore, that it should be argued on the one hand that the section should be construed in a wide sense so that no loophole may be left for the evader of tax, on the other, that it should be construed with the strictness appropriate in the case of a penal Act. . . . The

[1] *Doe* d. *Wyatt* v. *Byron* (1845), 1 C. B. 623. The statement in *Pool* v. *Neel* (1657), 2 Sid. 62, that this does not apply to novel remedies would most probably not be followed. In *Gorton* v. *Champneys* (1823), 1 Bing. 287, PARK, J., said that statutes against frauds were liberally construed.

[2] " The section is clearly of an amending or remedial character. It is essential to approach the construction of such an enactment without undue bias in favour of the strict law which the enactment is setting out to change. It is wrong to construe it in a niggardly and technical spirit, with an eye fixed on the old law. If it is approached in that spirit, it may be easy to eviscerate the enactment and deprive it of any effect " (*per* Lord WRIGHT in *Earl Fitzwilliam's Collieries Co.* v. *Phillips*, [1943] A. C. 570, at p. 580.

[3] *Dean and Chapter of Norwich's Case* (1598), 3 Co. Rep. 73a ; but see *R.* v. *Castlechurch* (*Inhabitants*) (1735), Burr S. C. 70.

[4] *Magdalen College, Cambridge Case* (1615), 11 Co. Rep. 66b, at 70b and 71a.

[5] *R.* v. *Sparrow* (1739), 2 Stra. 1123.

[6] *Anon.* (1774), Lofft. 648.

[7] *R.* v. *Halliday*, [1917] A. C. 260, at pp. 270, 274 ; *Norman* v. *Mathews* (1916), 32 T. L. R. 303, at p. 304 ; *Liversidge* v. *Anderson*, [1942] A. C. 206 ; and see *post*, p. 99.

[8] *Johnes* v. *Johnes* (1814), 3 Dow. 1, at p. 15 ; *R.* v. *Cheshire JJ.* (1845), 3 Dow. & L. 337 ; *Stainland Industrial Corn and Provision Society* v. *Stainland Urban Council*, [1906] 1 K. B. 233 ; *Dean and Chapter of York* v. *Middleburgh* (1828), 2 Y. & J. 196.

[9] *Foster* v. *Pritchard* (1857), 2 H. & N. 151 ; and see *Re R.*, [1906] 1 Ch. 730.

[10] *Stray* v. *Docker*, [1944] K. B. 351, at p. 355.

only safe rule, we think, is to give the words of the section, reading it as a whole, their full, and no more than their full, meaning." [1]

Repeal

Repeal of a statute is usually effected by express words, though repeal may be by implication, but only when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together.[2]

The repeal of a statute has the effect of removing it from the statute book as if it had never been passed, but this does not apply to transactions passed and concluded.[3] Vested rights acquired before repeal are not affected unless express provision is made to that effect.[4] A statute which prohibits something not *ipsa natura* unlawful must be construed as it stands. The words must not be amplified in order to meet a supposed evil or restricted in order to protect a natural freedom. The evil to be checked can only be considered so far as is necessary for the interpretation of the words and not as an independent determination of the scope of the remedy.[5]

Statutes limiting or extending Common Law Rights

If a statute is meant to alter common law rights it is expected to do so expressly, and consequently the Courts will only give that effect to plain and unambiguous words. "Broadly speaking, one may say that the Court does not construe an Act of Parliament as depriving a person of his normal rights as a subject unless clear language is used, and where that would be the effect of an Act in ordinary cases it has often been held that a comparatively slight context is sufficient to justify the Court in construing the language in the opposite sense." [6] Such statutes include those that:

(*a*) restrict the liberty of the subject[7]; but the Defence of the

[1] *Commissioners of Inland Revenue* v. *L. B. Holdings, Ltd.*, [1944] 1 All E. R. 308, *per cur.*, at p. 314 (reversed in H. L., [1946] 1 All E. R. 598); and see *L.N.E.R. Co.* v. *Berriman*, [1946] 1 All E. R. 255, *per* Lord WRIGHT.

[2] *Kutner* v. *Phillips*, [1891] 2 Q. B. 267, *per* A. L. SMITH, J., at pp. 271, 272. There is no presumption in favour of implied repeal (*per* DU PARCQ, L.J., in *R.* v. *National Arbitration Tribunal, Ex parte Bolton Corporation*, [1941] 2 K. B. 405, at p. 415; on appeal, [1943] A. C. 166. As to implied repeal by general words in a later statute see *ante*, p. 78.

[3] *Surtees* v. *Ellison* (1829), 9 B. & C. 750; *R.* v. *McLain* (1922), 91 L. J. (K. B.) 562.

[4] *Lemm* v. *Mitchell*, [1912] A. C. 400.

[5] *Equitable Life Assurance Society of the United States* v. *Reed*, [1914] A. C. 587.

[6] *Per* Lord GREENE, M.R., in *Billings* v. *Reed*, [1945] K. B. 11, at pp. 15–16; see also *Reid* v. *Reid* (1886), 31 Ch. D. 402, at p. 408.

[7] *R.* v. *Halliday*, [1917] A C. 260, at p, 274. "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute," *per* POLLOCK, C.B., in *Bowditch* v. *Balchin* (1850), 5 Exch. 378, at p. 381.

Realm Act and Regulations will not be looked at with as nice a scrutiny as a Finance Act [1];

(*b*) affect status or personal privilege [2];

(*c*) affect the prerogative [3];

(*d*) take away the jurisdiction of the superior Courts [4];

(*e*) restrict the right of peremptory challenge [5];

(*f*) prejudice a person who has no opportunity of being heard [6];

(*g*) modify the rules of public meetings [7];

(*h*) give a right of appeal [8];

(*i*) impose taxes or tolls or rates or other fiscal obligations [9];

(*j*) infringe private rights such as ownership.[10] In such cases private rights are not taken away without compensation in the absence of very clear words [11];

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[1] *Norman* v. *Mathews* (1916), 32 T. L. R. 303, at p. 304; *Michaels* v. *Block* (1918), 34 T. L. R. 438; and see *Liversidge* v. *Anderson*, [1942] A. C. 206. There are decisions on normal lines, e.g. *Dean* v. *Hiesler*, [1942] 2 All E. R. 340.

[2] *Randolph* v. *Milman* (1868), L. R. 4 C. P. 107; *Newcastle* (*Duke*) v. *Morris* (1870), L. R. 4 H. L. 661; *Re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, at p. 271; *Re Boaler*, [1915] 1 K. B. 21.

[3] *Magdalen College, Cambridge Case* (1615), 11 Co. Rep. 66b, at 68b, 74b; but see *A.-G. of Duchy of Lancaster* v. *Moresby*, [1919] W. N. 69; *A.-G.* v. *Cornwall County Council* (1933), 97 J. P. 281; cf. *A.-G.* v. *Morgan*, [1891] 1 Ch. 432. The prerogative can only be taken away by express words or necessary implication (*Re Wi Matua's Will*, [1908] A. C. 448, at p. 449).

[4] *R.* v. *Moreley* (1760), 2 Burr. 1040, 1042; *Seward* v. *Vera Cruz* (1884), 10 App. Cas. 59; *A.-G.* v. *Boden*, [1912] 1 K. B. 539, at p. 561.

[5] *Gray* v. *R.* (1844), 11 Cl. & Fin. 427; *Levinger* v. *R.* (1870), L. R. 3 P. C. 282, at p. 289.

[6] *Cooper* v. *Wandsworth Board of Works* (1863), 14 C. B. (N. S.) 180, at p. 187; *Brockwell* v. *Bullock* (1889), 22 Q. B. D. 567, at p. 575.

[7] *R.* v. *Wimbledon Local Board* (1882), 8 Q. B. D. 459.

[8] *R.* v. *Stock* (1838), 8 Ad. & El. 405; *Edwards* v. *Roberts*, [1891] 1 Q. B. 302, or give a right of appeal against acquittal; see *Benson* v. *Northern Ireland Road Transport Board*, [1942] A. C. 520, *per* Lord SIMON, C., at p. 526; *R.* v. *Keepers of the Peace and County of London Justices*, [1945] K. B. 528, at p. 530.

[9] *Inland Revenue Commissioners* v. *Gribble*, [1913] 3 K. B. 212, at p. 219; *Tennant* v. *Smith*, [1892] A. C. 150, at p. 154; *Hennell* v. *Inland Revenue Commissioners*, [1933] 1 K. B. 415, at pp. 421, 428; *Pryce* v. *Monmouthshire Canal & Rail. Cos.* (1879), 4 App. Cas. 197, at p. 202. ROWLATT, J., expressed an opposite view in *Cape Brandy Syndicate* v. *Comnrs. of Inland Revenue*, [1921] 1 K. B. 64, at p. 71; and see *Canadian Eagle Oil Co., Ltd.* v. *R.*, [1946] A. C. 119, at p. 140.

[10] *Scales* v. *Pickering* (1828), 4 Bing. 448, at p. 452; *Westminster Corporation* v. *London & North Western Rail. Co.*, [1905] A. C. 426; *Re Kemp*, [1945] 1 All E. R. 571, *per* TUCKER, J., at pp. 574–5.

[11] *Bournemouth-Swanage Motor Road and Ferry Co.* v. *Harvey & Sons*, [1929] 1 Ch. 686, at p. 706; *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ltd.*, [1919] A. C. 744; *Newcastle Breweries, Ltd.* v. *R.*, [1920] 1 K. B. 854; *Colonial Sugar Refining Co.* v. *Melbourne Harbour*

(*k*) impose a new obligation,[1] or introduce new principles into any branch of the law [2];
(*l*) interfere with existing contracts [3];
(*m*) work a forfeiture [4];
(*n*) are penal.[5]

Private Acts

Private Acts of Parliament are strictly construed.[6] It has been said that their language is that of the promoters and therefore should be taken most strongly against them.[7] Where a private Act operates as a contract or quasi-contract, it is governed by the rules of law applicable to that kind of contract.[8]

Trust Commissioners, [1927] A. C. 343. The fact that no compensation is provided may turn the scale in favour of a construction which does not take away rights as against another possible construction which does. *Foster Wheeler, Ltd.* v. *Green & Son, Ltd.*, [1946] Ch. 101, *per* DU PARCQ, L.J., at p. 108.

[1] *Finch* v. *Bannister*, [1908] 2 K. B. 441; see [1908] 1 K. B. 485, at p. 489.

[2] *Nothard* v. *Pepper* (1864), 17 C. B. (N. S.) 39, at p. 50; *Rolfe and Bank of Australasia* v. *Flower, Salting & Co.* (1865), L. R. 1 P. C. 27, at p. 48; *Re East London Rail. Co., Oliver's Claim* (1890), 24 Q. B. D. 507.

[3] *Morris* v. *Mellin* (1827), 6 B. & C. 446, at p. 449; *Barlow* v. *Teal* (1885), 15 Q. B. D. 403, at p. 501.

[4] *Blennerhassett* v. *Day* (1812), 2 Ball & B. 104, at p. 128.

[5] *Kent* v. *Whitby* (1738), 3 Bro. Parl. Cas. 487. "In a case where a statutory prohibition involving the possibility of a prosecution for misdemeanour has to be construed the words of prohibition must be strictly construed, that is, the meaning of the words cannot be properly extended beyond their natural significance unless it is clear from the context that the legislature intended them to be used in a wider sense. For example, the word 'imposed' does not mean 'imposed or assented to,'" *per* Lord MAUGHAM in *London Passenger Transport Board* v. *Moscrop*, [1942] A. C. 332, at p. 342; and see *Adrema, Ltd.* v. *Jenkinson*, [1945] K. B. 446, at p. 452; but this rule cannot be used to restrict words which have a clear meaning broad enough to cover the acts in question (*Elderton* v. *United Kingdon Totalisator Co., Ltd.*, [1946] Ch. 57, *per* Lord GREENE, M.R., at p. 61). A proviso (in a penal section) designed to save people in certain circumstances from the penalty, will be construed liberally (*Hutchinson* v. *Manchester, Bury and Rossendale Rail. Co.* (1846), 15 M. & W. 314).

[6] *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (1885), 15 Q. B. D. 597, at p. 603; *Bristol Guardians* v. *Bristol Waterworks Co.*, [1914] A. C. 379, at p. 387.

[7] *A.-G.* v. *Barnet District Gas and Water Co.* (1909), 101 L. T. 651, at pp. 654, 656; but see *Tanner* v. *Oldman*, [1896] 1 Q. B. 60.

[8] *London and South Western Rail. Co.* v. *Flower* (1875), 1 C. P. D. 77, at p. 85; *Corbett* v. *South Eastern and Chatham Railways Managing Committee*, [1906] 2 Ch. 12, at p. 20.

Consolidation and Codification

A consolidation statute *prima facie* does not alter the law,[1] but it may do so[2]; and there are a number of statutes which state that they are intended to amend and consolidate the law, and in such a case it is legitimate to examine the former statutes in order to ascertain the existing law which the amending statute is altering.[3] A codifying statute is passed in order to avoid the need for searching into existing authorities[4] and should be interpreted by its own language, and not by assuming that it does not alter the law, and then, having ascertained the previous law, looking at the statute to see if its words will bear that construction.[5] Where, however, its words are ambiguous or doubtful or have acquired a technical meaning recourse may be had to the previous authorities.[6]

Later General and Earlier Special Statute

A special rule relating to statutes is that a later general statute does not by implication affect an existing special statute.[7] This, of course, applies to sections and parts of an Act as well as to whole Acts. But the general statute may expressly do so[8] or may be in terms inconsistent with the continued existence of the special Act.[9] It was therefore held that the Judgments Act, 1838, ss. 13, 19, which makes general provisions as to judgments being made a charge on land, did not repeal the Middlesex Registry Act, 1708,[10] which required such judgments to be registered in respect of land in Middlesex,[11] but the Prescription Act, 1832,[12] by implication abolished the custom of London as to building to any height on old foundations notwithstanding an easement of light.[13] In the former case the general statute was consistent with the continued existence of the special statute, which in the latter case it was not. It may be

[1] *Mitchell* v. *Simpson* (1890), 25 Q. B. D. 183, at p. 190; *Gilbert* v. *Gilbert*, [1928] P. 1, at pp. 7, 8.

[2] *MacConnell* v. *Prill (E.) & Co., Ltd.*, [1916] 2 Ch. 57, at p. 63.

[3] See *Re Budgett, Cooper* v. *Adams*, [1894] 2 Ch. 557, at pp. 561, 562; *Thames Conservators* v. *Smeed*, [1897] 2 Q. B. 334.

[4] *Robinson* v. *Canadian Pacific Rail. Co.*, [1892] A. C. 481.

[5] *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, at p. 144.

[6] *Quebec Railway Light, Heat and Power Co.* v. *Vandry*, [1920] A. C. 662; *R.* v. *Abrahams*, [1904] 2 K. B. 859, at p. 863.

[7] *Seward* v. *The Vera Cruz* (1884), 10 App. Cas. 59; *Lancashire Asylums Board* v. *Manchester Corporation*, [1900] 1 Q. B. 458, at p. 471; *Nicolle* v. *Nicolle*, [1922] 1 A. C. 284; *Leivers* v. *Barber, Walker & Co.*, [1943] K. B. 385, at pp. 391, 392.

[8] *Barker* v. *Edger*, [1898] A. C. 748, at p. 754.

[9] *Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at p. 950.

[10] 15 Halsbury's Statutes 67.

[11] *Westbrook* v. *Blythe* (1854), 3 E. & B. 737.

[12] 5 Halsbury's Statutes 823.

[13] *Salters' Co.* v. *Jay* (1842), 3 Q. B. 109.

assumed that similar principles would be applied to other documents. Certainly general words in a document do not defeat an earlier special provision as to the same subject-matter.[1]

Insoluble Uncertainty

As words or phrases may be unintelligible, so also a clause or even a whole instrument may be so expressed as to leave the Court wholly uncertain.[2] If this is the case after all the legitimate devices have been unsuccessful, then the clause or the instrument is void. An unintelligible clause may be so integral a part of the instrument as to involve the whole: it depends upon whether it is severable or not.[3] This applies to all instruments, contracts,[4] deeds [5] and wills,[6] but the Courts struggle against this result.[7] Thus, where a testator gave his residuary estate to "Margaret Ann and/or John Richards" it was held that the two took as joint tenants, but if the first-named had not survived the testator, then the residue would have gone to the second as a substitutional gift.[8] But where a lessor reserved the right to get unleased minerals "causing no undue interference with the demised premises" [9] the expression "undue interference" was held to be so vague that the reservation failed. An ambiguity may be patent and incurable by evidence[10] or latent and no evidence be available to resolve the ambiguity.[11] In the case of a charity, an imperfect gift which manifests a general charitable intention can be applied *cy près*, but this is not possible where no such intention

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[1] *James Nelson & Sons* v. *Nelson Line* (*Liverpool*) (*No.* 2), [1907] 1 K. B. 769, at p. 780.

[2] This is not the same thing as difficulty in ascertaining the facts, so that it is not easy to apply the words. *Re Samuel, Jacobs* v. *Ramsden*, [1942] Ch. 1, at pp. 16, 18, 19, reversed as to the main issue on appeal *sub nom. Clayton* v. *Ramsden*, [1943] A. C. 320; and see *Re Clarke, Coombe* v. *Carter* (1887), 36 Ch. D. 348, at p. 355.

[3] *Guthing* v. *Lynn* (1831), 2 B. & Ad. 232.

[4] *Re Vince, Ex parte Baxter*, [1892] 2 Q. B. 478; *Bishop and Baxter, Ltd.* v. *Anglo-Eastern, etc. Co., Ltd.*, [1944] K. B. 12.

[5] *Mundy* v. *Rutland* (*Duke*) (1883), 23 Ch. D. 81.

[6] *Dowset* v. *Sweet* (1753), Amb. 175; *Re Stephenson, Donaldson* v. *Bamber*, [1897] 1 Ch. 75.

[7] *Doe* d. *Winter* v. *Perratt* (1843), 6 Man. & G. 314, at p. 362; *Re Roberts, Repington* v. *Roberts-Gawen* (1881), 19 Ch. D. 520, at p. 529; and see *Re Grainger, Dawson* v. *Higgins*, [1900] 2 Ch. 756, at p. 764; (on appeal) *sub nom. Higgins* v. *Dawson*, [1902] A. C. 1; *Josselson* v. *Borst*, [1938] 1 K. B. 723.

[8] *Re Lewis, Goronwy* v. *Richards*, [1942] Ch. 424.

[9] *Mundy* v. *Rutland* (*Duke*), *supra*; cf. *Murray* v. *Dunn*, [1907] A. C. 283, a condition against erection of buildings of "an unseemly description."

[10] As in *Mervyn* v. *Lyds* (1553), 1 Dyer, 90a.

[11] *Cheyney's* (*Lord*) *Case* (1591), 5 Co. Rep. 68a; *Re Jackson, Beattie* v. *Murphy*, [1933] Ch. 237, at p. 242.

is shown.[1] Thus where a testator gave the residue of his estate to the trustees of a parish church to be applied by them in their discretion for any purpose or object permitted by the trust deed and there never had been any trust deed or trustees, it was held that the gift failed for uncertainty.[2] It would not be easy to give examples from statutes. It would be a very serious matter for the Courts to hold that a statute has been reduced to a nullity by the draftsman's unskilfulness or ignorance.[3] A provision that the offender shall be transported and half the penalty be awarded to the informer is obviously such that the informer is not provided for at all.

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[1] *Re Davis, Hannen* v. *Hillyer*, [1902] 1 Ch. 876; *Re Tharp, Longrigg* v. *People's Dispensary for Sick Animals of the Poor, Incorporated*, [1942] 2 All E. R. 358; reversed on another point, [1943] 1 All E. R. 257.

[2] *Re Lawton, Lloyds Bank, Ltd.* v. *Longfleet St. Mary's Church Council*, [1940] Ch. 984.

[3] *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, at p. 634; and see *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.*, [1909] A. C. 15, at p. 23. For an example, see *R.* v. *King* (1826), 2 C. & P. 412.

Chapter V

FORM AND PARTS OF DOCUMENTS

It is not part of the design of this book to give a detailed treatment of the various rules and principles which have been applied to particular classes of documents. The foregoing pages have been concerned with principles of interpretation with regard to documents generally. A short series of paragraphs is added as to the form in which various particular classes of documents are usually made. It must always be borne in mind that in principle form gives way to substance, and it is only when particular forms or words are imperatively required by statute or rule of law that form is essential. As a rule form is a matter of convenience, but due form and order are important in expressing intention and ought not to be departed from without grave consideration.

The following classes of documents are dealt with:

(*a*) Statutes.
(*b*) Deeds.
(*c*) Parol Contracts.
(*d*) Wills.

(*a*) Statutes

General Form

A statute has a commencement which constitutes the long title, and in modern practice has also a short title by which it is commonly known. The date of receiving the Royal Assent is placed on the statute.

It is unusual for a modern public statute to have a preamble or for sections to commence with recitals. Following the preamble or, if none, the long title, come the enacting words which introduce the actual operative words of the Act. An Act may be divided into parts and is always divided into sections which may be divided again into subsections or sub-subsections. The Act may also be accompanied by one or more schedules which form part of the Act.

Title and Date of Operation

The title used not to be present, and its appearance dates back to the reign of Henry VII (1496). It was originally not part of the

Act but is so now.[1] It could, however, always be referred to as to the intention of Parliament. "I quite recognise that the title of an Act . . . is of importance as shewing the purview of the Act. It has never yet, however, been laid down that, if the language of an Act is clear, full effect is not to be given to it because it goes beyond the title."[2] The short title is merely a name (*e.g.* the Vexatious Actions Act, 1896), and enacts nothing; it is therefore immaterial whether it is an accurate description of the Act or not.[3]

The operation of a statute at common law dated from the first day of the session in which it was passed,[4] but by the Acts of Parliament (Commencement) Act, 1793,[5] the date of the Royal Assent is now indorsed, and, unless otherwise provided, that is the date on which the Act comes into force.[6] If an Act is to come into force on a particular day, it comes into operation immediately on the expiration of the previous day.[7]

The date of the passing of an Act is the date of the Royal Assent, not the date (if a special one be provided) when it is to come into operation.[8] It is often a matter of interpretation whether an Act is retrospective or not.[9]

Preamble

The disuse of a preamble to public Acts has been regretted in a number of cases.[10] There is a preamble to the Statute of Westminster, 1931.[11] It is equivalent to a recital in a deed and usually states the intention of Parliament in passing the Act. It cannot, however, control clear and express enacting words.[12] A statute

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[1] *Fielding (Fielden)* v. *Morley Corporation*, [1899] 1 Ch. 1, at p. 4; *Vacher & Sons, Ltd.* v. *London Society of Compositors*, [1913] A. C. 107, at pp. 128, 129.

[2] *Per* Lord ALVERSTONE, C.J., in *London C.C.* v. *Bermondsey Bioscope Co., Ltd.*, [1911] 1 K. B. 445, at p. 451; and see *R.* v. *Crisp and Homewood* (1919), 83 J. P. 121, *per* AVORY, J., at p. 122. The fact that a statute was passed when the subject matter to which it is applied was unknown is no objection if the words are apt (*A.-G.* v. *Edison Telephone Co. of London* (1880), 6 Q. B. D. 244, *per* STEPHEN, J., at p. 254; *Blyth* v. *Lord Advocate*, [1945] A. C. 32.

[3] *Re Boaler*, [1915] 1 K. B. 21.

[4] *Latless* v. *Holmes* (1792), 4 Term. Rep. 660, at p. 661.

[5] 18 Halsbury's Statutes 969.

[6] *R.* v. *Smith*, [1910] 1 K. B. 17, at pp. 24–5.

[7] Interpretation Act, 1889, s. 36 (2); 18 Halsbury's Statutes 1005.

[8] *Coleridge-Taylor* v. *Novello & Co., Ltd.*, [1938] Ch. 608.

[9] See, *e.g. London Fan and Motor Co.* v. *Silverman*, [1942] 1 All E. R. 307.

[10] As in *London C.C.* v. *Bermondsey Bioscope Co., supra*, at p. 451.

[11] 24 Halsbury's Statutes 125.

[12] *Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143; *Walter* v. *Lane*, [1900] A. C. 539, at p. 548; and see *Carlaw (David) & Sons, Ltd.* v. *Inland Revenue Commissioners* (1926), 11 Tax Cas. 96, where introductory words to a section indicating the purpose of the section did not control the words of the section.

might have one preamble or each section be introduced by a preamble or recital. The preamble is evidence of the intention of the legislature and therefore may be used to define and qualify general words and to solve doubts.[1] It therefore may be of use in three of the four points which *Heydon's Case* [2] lays down as material to be considered in construing statutes. A preamble is useful in that it may enable the Court to apply a meaning which accords with the preamble in preference to one which goes beyond or falls short of it.[3]

An erroneous recital in the preamble of an Act of the effect of a previous statute does not affect the construction of that statute.[4]

Private bills, however, must by the rules of both Houses of Parliament have preambles which must be proved.

The repeal of a preamble by a Statute Law Revision Act or similar statute does not affect the future reading of the Act which it introduced.

Parts and Sections

Division into parts is a mere matter of convenience.

A section is read as being in itself a substantive enactment,[5] but this does not affect the rule that a statute should be read as a whole.[6] It sometimes happens that two sections appear to be inconsistent, but it is usually possible to reconcile them,[7] but if they are irreconcilable, the later prevails,[8] subject to the rule as to particular provisions and general enactments.

Definition Section

It is the practice now to include a definition section,[9] which states meanings which the words used may bear or are to include. These may extend the ordinary meaning,[10] but are not to be used so as to disturb the plain meaning of words.[11] As a rule there is a provision that the statutory meaning applies unless the context

[1] See *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, at p. 143 ; *Thomson* v. *St. Catherine's College, Cambridge, etc.*, [1919] A C.. 468.

[2] (1584), 3 Co. Rep. 7a, at 7b ; see *per* Lord SIMON, C., in *Hickman* v. *Peacey*, [1945] A. C. 304, at p. 315.

[3] *West Ham Overseers* v. *Iles* (1883), 8 App. Cas. 386, at pp. 388, 389 ; *St. Catharine's College, Cambridge* v. *Rosse*, [1916] 1 Ch. 73.

[4] *Port of London Authority* v. *Canvey Island Commissioners*, [1932] 1 Ch. 492.

[5] Interpretation Act, 1889, s. 8; 18 Halsbury's Statutes 993.

[6] *Rhondda's (Viscountess) Claim*, [1922] 2 A. C. 339, at p. 397 ; *Lumsden* v. *Inland Revenue Commissioners*, [1914] A. C. 877, at pp. 887, 892, 922; *Re Orbit Trust, Ltd.'s Lease*, [1943] Ch. 144, at p. 150.

[7] *Ebbs* v. *Boulnois* (1875), 10 Ch. App. 479, at p. 484.

[8] *Wood* v. *Riley* (1867), L. R. 3 C. P. 26.

[9] See also *ante*, p. 74.

[10] *Ablert* v. *Pritchard* (1866), L. R. 1 C. P. 210 ; *R.* v. *Boiler Explosions Act, 1882, Commissioners*, [1891] 1 Q. B. 703, at p. 714.

[11] *R.* v. *Pearce* (1880), 5 Q. B. D. 386.

otherwise requires,[1] but that principle would apply in any case.[2] Frequently also the definition is so framed as not to be exhaustive, adds to that meaning.[3] "Where a definition clause says that a term shall include certain things not ordinarily included in its meaning, it follows that other things not ordinarily included are not within the meaning of the term."[4] "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."[5]

Definitions are put in for the purpose of promoting clarity by avoiding the constant repetition of a number of words. Often this object is not achieved.

Headings and Marginal Notes

Headings first appeared in the Clauses Consolidation Acts of 1845.[6] They are placed above sections or groups of sections, and are part of the statute. They are used to explain the section or group of sections placed under them[7] and have been said to be a better guide to construction than a preamble.[8] But they cannot control the clear meaning of the words of a section.[9] They are thus on a different footing to *Marginal Notes* which are not regarded as parts of the statute,[10] but where, as in many local Acts and in some general

[1] The context in question may be the whole Act (*Re Evans, Ex p. Evans*, [1891] 1 Q. B. 143, at pp. 145–6).

[2] *Meux* v. *Jacobs* (1875), L. R. 7 H. L. 481, at p. 493.

[3] See e.g. *Re Parsons, Parsons*, v. *A. G.*, [1943] Ch. 12, at p. 15.

[4] *Per* FINLAY, L.J., in *Tallents* v. *Bell and Goddard*, [1944] 2 All E. R. 474, at p. 476.

[5] *Dilworth* v. *Commr. of Stamps*, [1899] A. C. 99, at pp. 106–7 (P. C.); and see *Mellows* v. *Low*, [1923] 1 K. B. 522, at p. 526.

[6] 2 Halsbury's Statutes 648, 1113; 14 Halsbury's Statutes 30.

[7] *Martins* v. *Fowler*, [1926] A. C. 746.

[8] *Eastern Counties & London & Blackwall Rail. Co.* v. *Marriage* (1860), 9 H. L. Cas. 32, at p. 41.

[9] *Hammersmith & City Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171, at p. 216; *R.* v. *Hare*, [1934] 1 K. B. 354; *Re Carlton*, [1945] Ch. 280, at pp. 282–3. The C. A. declined to express any view on the point; [1945] Ch. 372.

[10] *Lang* v. *Kerr* (1878), 3 App. Cas. 529, at p. 536; *Sutton* v. *Sutton* (1882), 22 Ch. D. 511; at p. 513; *Re Boaler*, [1915] 1 K. B. 21; *Nixon* v. *A.-G.*, [1930] 1 Ch. 566, at pp. 593, 594; (on appeal), [1931] A. C. 184.

Acts, a section is by the statute itself identified by reference to the marginal note, it is impossible to ignore it.[1] Even then too much importance must not be attributed to a marginal note.[2]

Proviso, Exception and Saving Clause

A section may contain a *proviso* or an *exception* or a *saving clause.*

A proviso is intended to take out of the section, or of another section, something which would otherwise have been within the enacting part.[3] It is, therefore, a "fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it is a proviso."[4] If its meaning is doubtful, then it may not have the effect of creating the intended exception.[5] When the main enactment is repealed, the proviso goes with it.[6] A proviso is often inserted *ex abundanti cautela*, and in that case is not to be taken as enacting anything. Nevertheless substance prevails over form and, if the words make substantive law, then they are given their effect even if placed in the form of a proviso.[7] The fact that a clause commences with the words "Provided always," does not necessarily make the clause a proviso. It may be a substantive provision.[8] Where a section contains a proviso

[1] *Re Woking Urban Council* (*Basingstoke Canal*) *Act, 1911*, [1914] 1 Ch. 300, at p. 322.

[2] In *Allchin* v. *Coulthard*, [1942] 2 K. B. 228, at p. 232, GREENE, M.R., said, "S. 114" (of a local Act) "has as its marginal note the words 'application of revenue of undertakings,' and the same phrase appears in the preamble . . . I cannot attach to this phrase the importance that counsel for the Crown suggest that it bears. It is, in fact, a misdescription of the contents of the section. The section gives no directions as to the application of revenue as such" (affd., [1943] A. C. 607, without reference to this point). For a similar comment where the marginal note was on a private document, see *National Farmers Union Mutual Insurance Society, Ltd.* v. *Dawson*, [1941] 2 K. B. 424, at p. 430; see *Digby* v. *General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121, at p. 136. In *Stray* v. *Docker*, [1944] K. B. 351, CASSELS, J., at p. 357, relied on the marginal note. See also *Signy* v. *Abbey National Building Society*, [1944] K. B. 449, *per cur.*; *East Gloucestershire Rail. Co.* v. *Bartholomew* (1867), L. R. 3 Exch. 15 at p. 25; and *ante*, p. 47, and *post*, p. 115.

[3] *Mullins* v. *Surrey Treasurer* (1880), 5 Q. B. D. 170, at p. 173.

[4] *R.* v. *Dibdin*, [1910] P. 57, *per* MOULTON, L.J., at p. 125, cited in *No-Nail Cases Proprietary, Ltd.* v. *No-Nail Boxes, Ltd.*, [1944] K. B. 629, *per cur.*, at p. 637; *Reville, Ltd.* v. *Prudential Assurance Co., Ltd.*, [1944] A. C. 135, *per* Lord SIMON, C., at pp. 141–2.

[5] *Robertson* v. *Petros M. Nomikos, Ltd.*, [1939] A. C. 371, *per* Lord PORTER, at p. 394.

[6] *Horsnail* v. *Bruce* (1873), L. R. 8 C. P. 378, at p. 385.

[7] *Rhondda Urban Council* v. *Taff Vale Rail. Co.*, [1909] A. C. 253, at p. 258; *Foster Wheeler, Ltd.* v. *Green*, [1946] Ch. 24, at p. 28.

[8] *Egham & Staines Electricity Co., Ltd.* v. *Egham U.D.C.*, [1942] 2 All E. R. 154, at p. 156.

there is no rule that the enacting part is to be construed without reference to the proviso. The section must be construed as a whole [1] and the proviso may throw light upon the construction of the operative part. "It may be used as a guide between two possible constructions of the words to be found in the statute, or it may be inserted, as is sometimes the case, to prevent a possible construction, which was not intended, being placed upon other provisions." [2]

An exception forms part of the enactment of the section and *prima facie* does not confer affirmative rights. Special provisions as to particular persons or properties following on general provisions are regarded as exceptions from those general provisions.[3] The same may be the case when inconsistent statutes, one general and one particular, are passed about the same time.[4]

Saving clauses are inserted in order to prevent a particular result following from an enactment. Thus when a statute is repealed and substantially re-enacted by another, a saving clause may prevent the repeal having effect in the respect mentioned in the clause.[5] A saving clause which is repugnant to the body of a statute is void.[6] It only preserves things in being at the time of its enactment, and therefore without express words does not affect a transaction completed before then.[7]

Illustrations and Rules

Occasionally, illustrations are appended to a section and these are useful in construing the text.[8] An illustration in a statute is not a special provision for a particular case: its function is to show how the provisions of the statute are to be applied or how the facts which it states come within those provisions.[9]

Rules made under the authority of a statute are judged by the statute, but when it is provided in the statute that they are to have force as if enacted in the Act, they may be considered in construing the Act itself.[10] The general principle is that they neither abrogate nor override but supplement.[11]

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[1] *Jennings* v. *Kelly*, [1940] A. C. 206; *Elderton* v. *United Kingdom Totalisator Co., Ltd.*, [1946] Ch. 57, at p. 65.

[2] *Per* Lord GODDARD in *Bretherton* v. *U.K. Totalisator*, [1945] K. B. 555, at p. 561.

[3] *Taylor* v. *Oldham Corporation* (1876), 4 Ch. D. 395, at p. 410.

[4] See *Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640.

[5] *R.* v. *West Riding of Yorkshire Justices* (1876), 1 Q. B. D. 220; *Barnes* v. *Eddleston* (1876), 1 Ex. D. 102.

[6] *Alton Wood's Case*, *A.-G.* v. *Bushopp* (1600), 1 Co. Rep. 40b, 47a, 52b; *Riddell* v. *White* (1793), 1 Anst. 281.

[7] *Butcher* v. *Henderson* (1868), L. R. 3 Q. B. 335.

[8] *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*, [1916] 2 A. C. 575.

[9] *Saadat Kamel Hanum* v. *A.-G. for Palestine*, [1939] A. C. 508.

[10] *Re Wier, Ex parte Wier* (1871), 6 Ch. App. 875, at p. 879.

[11] *Watkins* v. *Naval Colliery Co.* (1897), *Ltd.*, [1911] 2 K. B. 162; (on appeal), [1912] A. C. 693.

Rules and other regulations made under the authority of statute, when duly made, have statutory force and effect. But the fact that the statute has provided that the rules shall have effect as if enacted in the statute does not prevent the Courts inquiring into their validity.[1]

Schedules and Forms

Schedules (said to be first found in the Isle of Man Purchase Act, 1765 [2]) are part of the Acts to which they are annexed and have statutory force and effect accordingly,[3] but where the schedule sets out a form in order to carry out the provisions of the sections, the form may have to give way to those provisions.[4] A schedule can only be used to assist the construction of the enacting words if those words are ambiguous.[5] Model forms have in this regard less weight than those which form an essential part in the operation of the Act.[6] A form may be made imperative,[7] but not always. Forms prescribed by rules under the Act have been referred to for the purpose of construction.[8] They would appear to have the same status as statutory rules.[9] A document scheduled to an Act and given effect to, *e.g.* an agreement, has statutory validity, and an objection to its validity, such as uncertainty, cannot be made though fatal to a private document.[10] Indeed the confirmation of an agreement may confer statutory powers in excess of those stated in the body of the statute,[11] though as a rule the statute rather explains and identifies the agreement which it confirms than creates independent rights.[12] When a statute makes provisions with express reference to a plan or other document, then for the purpose for

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[1] *Minister of Health* v. *R., Ex parte Yaffe*, [1931] A. C. 494.

[2] 5 Halsbury's Statutes 678.

[3] *A.-G.* v. *Lamplough* (1878), 3 Ex. D. 214, at p. 229; and see *Inland Revenue Commissioners* v. *Gittus*, [1920] 1 K. B. 563; (on appeal), [1921] 2 A. C. 81.

[4] *R.* v. *Lumsdaine* (1839), 10 Ad. & El. 157, at p. 160; *R.* v. *Baines* (1840), 12 Ad. & El. 210, at p. 227; *Bartlett* v. *Gibbs* (1843), 5 Man. & G. 81, at pp. 96.

[5] *Ellerman Lines* v. *Murray*, [1931] A. C. 126; *Thomas* v. *Kelly* (1888), 13 App. Cas. 506, at p. 511.

[6] *Simpson* v. *South Staffordshire Waterworks Co.* (1865), 4 De G. J. & Sm. 679, at p. 688; *Dean* v. *Green* (1882), 8 P. D. 79, at p. 89; *Saunders* v. *White*, [1902] 1 K. B. 472.

[7] *Wing* v. *Epsom Urban District Council*, [1904] 1 K. B. 798.

[8] *Re Norman, Ex parte Board of Trade*, [1893] 2 Q. B. 369, at p. 376; *Eldorado Ice Cream Co.* v. *Clark*, [1938] 1 K. B. 715.

[9] *Dale's Case* (1881), 6 Q. B. D. 376, at p. 456.

[10] *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Caledonian Rail. Co.* v. *Greenock and Wemyss Bay Rail. Co.* (1874), L. R. 2 Sc. & D. 347.

[11] *Westgate & Birchington Water Co.* v. *Powell-Cotton* (1915) 85 L. J. (Ch.) 459.

[12] *Toronto Corporation* v. *Toronto Rail. Co.*, [1916] 2 A. C. 542.

which such reference is made the plan or document is part of the statute.[1]

Incorporation

A statute may incorporate the whole or any part of another statute or declare that it shall be read together with another statute, or without any internal reference a statute may be *in pari materia* with another. The principles as to incorporation are the same as in the case of other documents and have been dealt with, *ante*, at p. 49.

(*b*) DEEDS

Date and Parties

The modern practice is to insert the *date* at the commencement of the deed before the mention of the parties, but it is not necessary to put the date upon it or to place the date in any particular position. A deed takes effect from its delivery[2] and consequently even an impossible date, *e.g.* 30th February, cannot affect it.[3] The actual date of delivery has always been provable. Periods of time mentioned in the deed are calculated (in the absence of other provision as to reference) with reference to the date on the deed, but if there is not a date or it is an impossible one, then with reference to the date of delivery.[4] The parties should be expressly named in the commencement of the deed. An erroneous or imperfect name or designation of a party can always be corrected by evidence.[5] As the names are merely to identify, a description of a class will suffice, *e.g.* "all the Creditors of A."[6] A false description only vitiates a deed if it does not make it possible to identify the party.[7]

Recitals

After the parties come the recitals (if any), though sometimes the recitals are placed in a schedule. Recitals are not a necessary part of a deed. They have, as such, no effect or operation, nor can

[1] *North British Rail. Co.* v. *Tod* (1846), 12 Cl. & Fin. 722; *Edinburgh Street Tramways Co.* v. *Black* (1873), L. R. 2 Sc. & D. 336; cf. *Simpson* v. *S. Staffs. Waterworks Co.* (1865), 4 De G. J. & Sm. 679.

[2] Shep. Touch. 72.

[3] *Goddard's Case* (1584), 2 Co. Rep. 4b; *Cromwell* v. *Grumsden* (1698), 1 Ld. Raym. 335.

[4] *Styles* v. *Wardle* (1825), 4 B. & C. 908, at p. 911. In the same way the date of a notice is the date when it is received by or on behalf of the person notified (*Holt* v. *Heatherfield Trust, Ltd.*, [1942] 2 K. B. 1, at p. 6).

[5] *Gould* v. *Barnes* (1811), 3 Taunt. 504; *Janes* v. *Whitbread* (1851), 11 C. B. 406, at p. 413; *Wray* v. *Wray*, [1905] 2 Ch. 349.

[6] *Gresty* v. *Gibson* (1866), L. R. 1 Exch. 112; *Reeves* v. *Watts* (1866), L. R. 1 Q. B. 412.

[7] *Evers' (Lord) Case and Strickland* (1610), 1 Bulst. 21.

they control the operative part when it is clear.[1] They may, however, be used in order to clear up doubts which arise on the words of the operative part.[2] It has been said that the recital in a suretyship bond is usually the key to the meaning of the condition.[3] The recitals of the particular matter will control the general words of a release so that it will be confined to that particular matter.[4] The omission of a name in the operative part has been supplied by a recital.[5] A misrecital has never been held to vitiate a deed which is otherwise sufficiently clear, but it cannot be corrected by reference to the document recited.[6] But a Crown grant may be avoided by reason of a misrecital. A party cannot be required to execute a deed containing a misrecital,[7] for a misrecital may affect the construction[8] or amount to notice or give rise to an estoppel. As before explained, an operative part of the deed may be contained in what is expressed to be a recital.

Operative Part

In the operative part it is usual to state the consideration, but if it is omitted or partly omitted or inaccurately stated, the true consideration can be proved, provided it is not inconsistent with the consideration stated in the deed.[9] In some cases, *e.g.* a mortgage bill of sale, the deed is void unless the true consideration is stated. When the consideration is money payable on completion, a receipt clause is added. Before the Supreme Court of Judicature Act, 1873,[10] such a clause was conclusive at law but not in equity, but now the rule in equity prevails except as against a subsequent purchaser.[11]

Exceptions and Reservations

An exception is a clause excluding from the operation of the deed something which would otherwise be included. As it is inserted for the benefit of the grantor, it is construed in favour of the grantee.[12]

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[1] *Bailey* v. *Lloyd* (1829), 5 Russ. 330, at p. 334; *Howard* v. *Shrewsbury (Earl)* (1874), L. R. 17 Eq. 378; *Australian Joint Stock Bank* v. *Bailey*, [1899] A. C. 396; *Inland Revenue Commissioners* v. *Raphael*, [1935] A. C. 96.

[2] *Orr* v. *Mitchell*, [1893] A. C. 238, at p. 254; *Crouch* v. *Crouch*, [1912] 1 K. B. 378; *Re Moon, Ex parte Dawes* (1886), 17 Q. B. D. 275; *Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500.

[3] *London Assurance Co.* v. *Bold* (1844), 6 Q. B. 514, at p. 526.

[4] *Ramsden* v. *Hylton* (1751), 2 Ves. Sen. 304, at p. 310; *London and South Western Rail. Co. (Directors, etc.)* v. *Blackmore* (1870), L. R. 4 H. L. 610, at p. 623; *Cloutte* v. *Storey*, [1911] 1 Ch. 18, at p. 134.

[5] *Dent* v. *Clayton* (1864), 33 L. J. (Ch.) 503.

[6] *Lainson* v. *Tremere* (1834), 1 Ad. & El. 792.

[7] *Hartley* v. *Burton* (1868), 3 Ch. App. 365.

[8] *Moseley* v. *Motteux* (1842), 10 M. & W. 533.

[9] *Clifford* v. *Turrell* (1845), 9 Jur. 633; *Frith* v. *Frith*, [1906] A. C. 254.

[10] 13 Halsbury's Statutes 205.

[11] Law of Property Act, 1925, s. 68; 15 Halsbury's Statutes 245

[12] *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, at p. 537.

As it was taken out of the grant, it operated even if the deed were not executed by the grantee. A reservation is a re-grant out of the subject-matter of something not previously existing, as where the grantor reserves an easement in favour of lands retained by him. As an easement cannot exist in favour of lands owned and occupied by the owner of the servient tenement, the easement must be created on the severance and is therefore a reservation.[1] At one time a reservation could only be made if the grantee executed the deed or if it was made by way of use, but now it is not necessary for the grantee to execute the deed,[2] and uses are abolished.

General Words

Conveyances used to include general words both as to the parcels and the interest conveyed. These are now implied and are a subject which is fully dealt with in the books on conveyancing. The exact interest or obligation conveyed, assigned or created by a deed is a matter of general law.

Habendum

The premises of a deed are all the parts which precede the habendum. The habendum is the clause which sets out the estate or interest that the grantee is to have in the parcels described in the premises.[3] Hence, apparently, arose the use of the word premises to describe immovable property. If there is no habendum, but the estate or interest is mentioned in the premises, then the grantee takes such estate or interest.[4] It is not proposed here to pursue the matter of limitations further as the works on conveyancing deal with it in detail.

Covenants

As a rule a deed contains covenants. It may indeed contain nothing else, as a covenant is an agreement under seal,[5] although the term is also used to denote a contract or agreement not under seal.[6] There is no need to use any particular form of words; any words which show that a promise to do or abstain from doing is being made will be sufficient.[7] The parties cannot agree under seal and provide that this agreement shall not create a covenant.[8] A statement of

[1] *Jones* v. *Consolidated Anthracite Collieries, Ltd. & Dynevor* (*Lord*), [1916] 1 K. B. 123, at p. 135.

[2] Law of Property Act, 1925, s. 68; 15 Halsbury's Statutes 245.

[3] *Buckler's Case* (1597), 2 Co. Rep. 55a; but see *Reid* v. *Fairbanks* (1853), 13 C. B. 692.

[4] *Goodtitle* d. *Dodwell* v. *Gibbs* (1826), 5 B. & C. 709, at p. 717.

[5] *Randall* v. *Lynch* (1810), 12 East 179.

[6] *Hayne* v. *Cummings* (1864), 16 C. B. (N. S.), 421.

[7] *Westacott* v. *Hahn*, [1918] 1 K. B. 495, at p. 505; *Russell* v. *Watts* (1885), 10 App. Cas. 590.

[8] *Ellison* v. *Bignold* (1821), 2 Jac. & W. 503.

intention may create a covenant [1] and so may one of willingness.[2] A declaration of trust may create a covenant,[3] but the deed must be executed by the trustee and not merely acted on by him.[4] A recital may also do so, but not where the operative part contains an express covenant relating to the same subject-matter.[5] It must be remembered that if both words of covenant and condition are used they both operate, A provision may therefore operate both as a covenant and as a condition.[6]

Construction of Covenants

The question whether a covenant is joint or several or joint and several where there are more covenantors than one is a matter which is determined on the ordinary principles of interpretation. So also is the question whether covenants are qualified or unqualified or mutual or independent, or whether an act by one is a condition precedent to the performance of his part by the other, or whether they must fulfil their obligations simultaneously, or whether a sum payable on breach is a penalty or liquidated damages. Covenants in restraint of trade are a special branch of law and are not included here. Covenants to settle property and marriage articles are fully dealt with in the books on conveyancing.

Statutory Terms

Modern legislation frequently makes provision as to the terms of contracts. This may be done by way of providing that certain terms shall apply unless the parties expressly or by necessary implication provide otherwise. But it may also be done in order to limit the freedom of contract so as to make imperative provisions, and in such cases the parties cannot by their agreement make provisions inconsistent with the statute.[7]

Attestation Clause

A deed closes with the attestation clause. It is under seal, signed and attested by one witness unless the law expressly requires more than one. There may be a schedule, which forms part of the deed by reason of the reference to it in the deed. A schedule is merely a matter of convenience and ought not to affect the construction.

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[1] *MacKenzie* v. *Childers* (1889), 43 Ch. D. 265, at p. 275.

[2] *Walker* v. *Walker* (1636), 1 Roll Abr. 519, p. 8, where the words used were "I will be ready at all times."

[3] *Benson* v. *Benson* (1710), 1 P. Wms. 130.

[4] *Richardson* v. *Jenkins* (1853), 1 Drew. 477.

[5] *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, at p. 359; and see *ante*, p. 48.

[6] *Doe* d. *Henniker* v. *Watt* (1828), 8 B. & C. 308, *per* BAYLEY, J., at pp. 315–6.

[7] *Nolan* v. *Riley* (*Coventry*), *Ltd.*, [1945] 2 All E. R. 8, *per* SCOTT, L.J., at p. 10.

(c) Parol Contracts

Contracts and agreements not under seal follow similar rules to those under seal. They are as a rule less formal, and the parties, in the absence of statutory provision, may put them into any shape they please. Unless a statute so requires, attestation is not necessary.

Marginal Notes

Agreements not under seal but of great importance, such as policies of insurance, often have marginal notes. The rule as to these notes was stated by Lord Atkin [1] as follows:

"The marginal descriptions no doubt form part of the contractual document, and are not to be ignored, as in a statute; but they must be given their proper value, and, in my opinion, they are used as general descriptions of the particular provisions contained in the sections, the words of which alone define the terms of the actual contract between the parties. I can see no justification for transferring the words in the margin to the body of the document."

Construction of Conditions and Other Terms

When a condition is contained in some other document it is called a defeasance.[2]

An important consideration is whether words used in a contract form are intended to be a condition or a warranty (bearing in mind that in certain classes of contracts the term " warranty " is used as meaning a condition), or whether they are mere words of description or expectation not involving obligation. A similar consideration is whether terms in an instrument are independent of or dependent on one another, and if dependent whether they are concurrent, or whether one or more are precedent or subsequent to the other or others. The law defines what is a condition and what is a warranty, and the questions here raised are solved by the application of the rules of interpretation, there being no special rule. Nor is there any rule peculiar to the question whether a contract or the consideration for a contract is whole or divisible. Important consequences may follow according to whether the true meaning is that the contract or consideration is one or the other, but once the meaning has been ascertained that is a matter of applying the appropriate rule of law and not of construction. The question as to joint or several obligation depends on the same principles as in the law of covenants.

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[1] *Digby* v. *General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121, at p. 136; and see *ante*, p. 47, note (7), and p. 108, note (2).

[2] *Re Storey, Ex p. Popplewell* (1882), 21 Ch. D. 73, at p. 81.

Law to be Applied

The law to be applied to a contract is that by which the parties have agreed or intended it to be governed. For this purpose there are certain presumptions which are applied where the contract does not expressly or by implication provide what law is to govern its interpretation.[1] Where the parties have expressly provided, no difficulty arises.[2] Where there is no stipulation the Court must ascertain the intention by a consideration of the contract as a whole.[3] In the absence of other circumstances, the presumption is that the proper law is the *lex loci contractus*.[4] Where the place of performance is the place where the contract is to be enforced, then presumably the *lex loci solutionis* applies.[5] A bill or cheque drawn abroad but payable in England is governed by English law.[6] The form, the language, the situation of the subject-matter, especially when it is land, the law which is most effective,[7] and the place which has most real connection with the transaction are all material considerations. Nationality and residence of themselves have little weight.

Where a contract by whatever law it is governed is illegal by English law it will not be enforced here if contrary to public policy or morality,[8] but otherwise it will be enforced.[9]

(*d*) WILLS

Wills and other testamentary dispositions must be in writing, and signed and attested as required by the Wills Act, 1837, s. 9.[10] There is an exception for soldiers on active service and mariners at sea, who can make an informal will, even by word of mouth. But provided the signing and attesting of a will are duly carried out the writing need not be in any special form, and dispositions by will have

[1] *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79.

[2] *The Cap Blanco*, [1913] P. 130; *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101.

[3] *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202; *Spurrier* v. *La Cloche*, [1902] A. C. 446; as to a settlement, *Marlborough* (*Duke*) v. *A.-G.* (No. 1), [1945] Ch. 78, at pp. 88–9.

[4] *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589.

[5] *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, at pp. 82, 83.

[6] *Moulis* v. *Owen*, [1907] 1 K. B. 746.

[7] *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321; *Jones* v. *Oceanic Steam Navigation Co.*, [1924] 2 K. B. 730.

[8] *Robinson* v. *Bland* (1760), 2 Burr. 1077, at p. 1084.

[9] Cf. *Quarrier* v. *Colston* (1842), 1 Ph. 147; and *Saxby* v. *Fulton*, [1909] 2 K. B. 208, with *Robinson* v. *Bland*, *supra*; *Moulis* v. *Owen*, *supra*; *Société Anonyme des Grands Etablissements de Touquet Paris-Plage* v. *Baumgart* (1927), 96 L. J. (K. B.) 789; and *Société des Hotels Réunis* (*Société Anonyme*) v. *Hawker* (1914), 30 T. L. R. 423.

[10] Wills Act 1837, s. 9; 20 Halsbury's Statutes 441.

never been subjected to the rules as to the use of specific words as in the case of dispositions *inter vivos*. As a rule, however, a will, after naming the testator, appoints executors and then proceeds with specific legacies and devises, concluding with a residuary devise and bequest with the date and attestation clause. By the nature of things a will cannot operate as a covenant, but it may contain recitals. Where a will is made for the purpose of exercising a power, it is sufficient in all cases if it is executed in the manner required by the Wills Act, whatever form may be required by the instrument creating the power.[1]

Codicils

A codicil is a document amending or supplementing an existing will and must be executed in the same way as a will.[2] As in the case of a will, there is no legal requirement as to form. A will and codicil must be read together, as they are deemed to take effect as if executed immediately before the death of the testator. A will or a codicil is *made* on the day on which it is executed,[3] but a codicil may have the effect of making the will afresh, so that the will and codicil are made at the later date.[3]

Recitals

A will or codicil sometimes contains a recital, and this is subject to the same general rules as recitals in other documents.[4] Words of recital or acknowledgment of indebtedness or of affection without further words are not construed as gifts,[5] and a recital which shows that the testator considered that a person was entitled to property negatives an intention to give it, but a recital showing that testator is under the impression that he has made a bequest which he has not done is evidence of an intention to do so.[6] Accordingly where the other words of the will permit such a course, the Courts will imply such a gift,[7] but must be satisfied that there really has been a mistake in carrying out the testator's intention.[8] In other cases the recital is treated as erroneous and disregarded.[9]

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[1] Wills Act, 1837, s. 10; 20 Halsbury's Statutes 441.
[2] Wills Act, 1837, s. 9; 20 Halsbury's Statutes 441.
[3] *Re Waring, Westminster Bank, Ltd.* v. *Awdry*, [1942] Ch. 426 (C. A.); but see *Re Sebag-Montefiore*, [1944] Ch. 331.
[4] *Pullin* v. *Pullin* (1825), 10 Moore C. P. 464; *Culsha* v. *Cheese* (1849), 7 Hare, 236; *Re Venn, Lindon* v. *Ingram*, [1904] 2 Ch. 52.
[5] *Re Rowe, Pike* v. *Hamlyn*, [1898] 1 Ch. 153, at p. 160.
[6] *Adams* v. *Adams* (1842), 1 Hare, 537, at pp. 540, 541; cf. *Re Bagot, Paton* v. *Ormerod*, [1893] 3 Ch. 348.
[7] *Bibin* v. *Walker* (1768), Amb. 661; *Re Yates, Singleton* v. *Povah* (1922), 128 L. T. 619.
[8] *Smith* v. *Fitzgerald* (1814), 3 Ves. & B. 2, at p. 8.
[9] *Gordon* v. *Hoffman* (1834), 7 Sim. 29.

A will or codicil is executed by being signed or the signature being acknowledged by the testator in the presence of two witnesses who add their signature. The attestation clause ought to contain words that make it clear that the statutory requirements have been fully complied with.

For the special rules relating to the interpretation of testamentary dispositions, the reader is referred to the general text books on Executors and on Wills.

CHAPTER VI

GENERAL PRINCIPLES OF DRAFTING

" IT often happens that important decisions turn on one word, and it is as well that draftsmen should bear that fact in mind." [1]

(1) A well drafted document should be clear to any person who has a competent knowledge of the subject-matter. If it is to be read with another document, then it should be so worded that the two are consistent with one another, and the meaning of them in combination is clear. Apart from decisions as to the admissibility of evidence in order to inform the mind of the Court, most of the cases on construction deal with problems arising with regard to documents which are imperfect from one reason or another.

(2) A document may be imperfect because it says too much, or too little, or is ambiguous, or combines one or more of these defects, or because it has to be applied in circumstances which the draftsman never contemplated. A frequent source of ambiguity is the fact that a draftsman is thinking that he is saying one thing when he is really saying more than one, or that he is dealing with a simple thing when it is really complex or subject to unsuspected qualifications or exceptions. The opposite state of affairs may also cause ambiguity.

(3) A draftsman should therefore begin by satisfying himself that he appreciates what he means to say, what he does not mean to say, and what he need not say. Many a document, otherwise well drawn, causes trouble because, though the draftsman has dealt with the point in his mind, he has not sufficiently considered the possibilities.

(4) The order should be logical. A logical arrangement minimises the risk of omission or repetition. Nevertheless in every case the points should be checked and re-checked. Innovation may be unavoidable and may indeed solve the problem, but as far as possible, and whenever possible, well known and accepted forms should be used.

(5) As far as possible, a document should be self-explanatory. If the operative parts are not of themselves sufficient for that purpose, it may be desirable to introduce them by recitals, but care should be taken to be sure that these are really necessary.

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[1] *Per* DU PARCQ, L.J., in *Dickinson* v. *St. Aubyn*, [1944] K. B. 454, at p. 459.

(6) When a document deals with a single subject, it is unnecessary to divide it into parts, but where it deals with a number of subjects which are not dealt with all in the same way, it is a matter for consideration whether the document would not be clearer if so divided. Where the subjects are completely distinct, or the rules of law respectively applicable differ, then probably it will be found that it is better to have separate documents. They can, if need be, refer to one another. A document divided into parts should have each part arranged in a logical order. If certain matters are common to all the parts, it is better as a rule to let them come at the end in a separate part, unless they are introductory. In the latter case they should precede and not follow.

(7) Whether any portion of the document should be put into a schedule or schedules depends on circumstances. A schedule is useful for matter which cannot be omitted, but which, if inserted in the body of the document, tends to obscure the sense of the document. The test is clarity and convenience. For example, if parties by a document agree (*inter alia*) that a transaction shall be entered into in a particular form, that form is usually best put into a schedule. In a conveyance of land recitals and estate covenants are often put into a schedule. Whenever a schedule is used, appropriate reference to it must be made in the body of the document. Similar principles apply to a plan which is useful in many cases to make things plain.

(8) A legal document, when properly drawn, is a work of art but is not an exercise in *belles lettres*. When drafting such a document, it is most important to use the English language in accordance with the rules of grammar. It is true that false English and false grammar, when recognised to be such, do not harm, but they are a source of uncertainty and of controversy.

(9) Words should always be used in the same sense. If the meaning is changed, the word should be changed or the change of the meaning clearly stated. Words should be considered in their context, lest by that context the intended meaning be modified. Technical matters are best dealt with by using the appropriate technical terms, and such terms should always be used with their technical meaning. There is no advantage in using technical terms except with regard to technical matters. If some other meaning is intended or the matter is not technical, the English language can supply other words.

(10) The active voice is preferable to the passive, unless the passive voice in a particular connection makes the meaning more clear. Dependent sentences and relative words, especially pronouns as subjects, should be avoided. Repetition of the same word or phrase is not a vice in drafting. Unnecessary verbiage should be rigidly excluded. It can do no good and may cause uncertainty

or invite controversy. But striving after a concise statement must not lead the draftsman into being so terse as to be obscure or incomplete.

(11) Sentences should be as short as is compatible with clarity. Positive statements should come first, and then, if need be, qualifications, provisoes, exceptions, reservations and the like can follow. A draftsman is not bound to say everything at once. One thing at a time and each point by itself is far better.

(12) Before finally passing a draft, the draftsman should reconsider it. He must satisfy himself, before it is too late, that the draft means what he intends, and that its terms are clear and definite, that it does not say anything more or less than what is intended, that it takes into account all the circumstances that ought to be contemplated and that the requirements of the law have been properly observed. It is not amiss for him to consider whether anyone, who does not wish the document to mean what the draftsman intends, could argue with a reasonable chance of success that it does not bear the intended meaning but some other meaning. For it is essential, not only that a document shall be understood, but also that it shall not be misunderstood.

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